80-346

No.....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1980

COMMONWEALTH OF VIRGINIA AND COLONEL DENNY M. SLANE, SUPERINTENDENT VIRGINIA STATE POLICE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), as interpreted by this Court in Washington v. Davis, 426 U.S. 229 (1976), permit validation of a written employment test against training school performance where the training program is substantial and a prerequisite to permanent employment.

2. Did the Court of Appeals err in permitting the Government on remand to present additional evidence where, through no error of the District Court, the Government failed to prove a prima facie case under Hazelwood School District v. United States, 433 U.S. 299 (1977).

3. Did the Court of Appeals err in directing the District Court to reconsider in light of EEOC guidelines the charge that the background investigations served as a pretext for eliminating black applicants.

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Opinions Below	2
Jurisdiction	3
Statutory Provisions Involved	4
Statement of the Case	4
Reasons for Granting the Writ	10
I. This Case Presents the Opportunity for this Court to Eliminate Confusion Which Now Exists in the Federal Courts Concerning the Proper Application of Washington v. Davis and the Principles of Training School Validation in Title VII Actions	10
II. The Court of Appeals Decision Encourages Unending Piecemeal Litigation Permitting the Errors of Trial Counsel to be Remedied by the Granting of a New Trial	16
III. The Court of Appeal's Decision Misapplies EEOC Guidelines to Claims of Intentional Reconsideration Discrimination and Requires Reconsideration of the Record Where There Has Been No Finding of Error	22

Page

Conclusion 24

Certificate of Service 24

Court of Appeals Opinion and Order ..... Appendix A

District Court Liability Opinion ..... Appendix B

District Court Relief Opinion ..... Appendix C

Sections 703(a) and (h) of Title VII of the Civil Rights Act of 1964, as Amended ..... Appendix D

Sections 518(a), (b) and (c)(1) of the Omnibus Crime Control and Safe Streets Act of 1968, as Amended ... Appendix E

EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607, et seq. ..... Appendix F

TABLE OF AUTHORITIES

Page

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 11

Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979), cert. denied, ____ U.S. ____, 48 U.S.L.W. 3698 (1980) 13

Byrd v. Blue Ridge Elec. Co-op., Inc., 356 U.S. 525 (1958) 19, 21

Ensley Branch of N.A.A.C.P. v. Seibels, 616 F.2d 812 (5th Cir. 1980) 13

E.E.O.C. v. Radiator Specialty, 610 F.2d 178 (4th Cir. 1979) 20

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 6, 11, 12

Harless v. Duck, ___ F.2d ___, 22 EPD ¶ 30871 (6th Cir. 1980) 13

Hazelwood School District v. United States, 433 U.S. 299 (1977) 3, 10, 17

Image of Gr. San Antonio Texas v. Brown, 570 F.2d 517 (5th Cir. 1978) 14

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 7, 22, 23

Richardson v. McFadden, 540 F.2d 744 (4th Cir. 1976) 14

United States v. City of Buffalo, 457 F.Supp. 612 (W.D. N.Y.. 1978) 14

Page

United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) 14

United States v. Commonwealth, 454 F.Supp. 1077 (E.D. Va. 1978) 1

United States v. Commonwealth, ___ F.2d ___, 22 EPD ¶ 30854 (4th Cir. 1980) 2

United States v. Shotwell Mfg. Co., 355 U.S. 233 (1957) 19, 21

United States v. State of South Carolina, 445 F.Supp. 1094 (D. S.C. 1977) (three judge court), aff'd mem., 434 U.S. 1026 (1978) 14

Washington v. Davis, 426 U.S. 229 (1976) ... 3, 6 11, 12, 14, 15

Statutes

Civil Rights Act of 1964, (Title VII) 42 U.S.C. § 2000e, et seq. 3, 4

Crime Control Act 42 U.S.C. § 3766 4

Civil Rights Act of 1866, 42 U.S.C. § 1981 . 4
Civil Rights Act of 1871, 42 U.S.C. § 1983 . 4

United States Code, Title 28, Sec. 1254(1) . 3

Regulations

E.E.O.C. Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607, et seq. .. App. F

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMONWEALTH OF VIRGINIA and COLONEL
DENNY M. SLANE, SUPERINTENDENT
VIRGINIA STATE POLICE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

The Petitioners, Commonwealth of Virginia, et al., (hereinafter, "Virginia"), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in United States v. Commonwealth, et al. on April 17, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals in United States v. Commonwealth of Virginia is not yet officially reported and it appears as Appendix A. That decision has been unofficially reported at 22 EPD ¶ 30854. The decision of the United States District Court for the Eastern District of Virginia on liability is reported at 454 F.Supp. 1077, and is unofficially reported at 18 EPD ¶ 8779. That decision is reprinted as Appendix B. The decision of the District Court on relief is not officially or unofficially reported but is reprinted as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 17, 1980. Thereafter, on May 1, 1980, Virginia filed a petition for rehearing. On June 3, 1980, the petition for rehearing was denied. The Order denying a rehearing is reprinted at the end of Appendix A. This Petition for Certiorari is being filed within 90 days of the denial of a rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3766, are set forth as Appendix D and Appendix E respectively.

STATEMENT OF CASE

In December, 1976, the United States (Government) brought suit against the Commonwealth of Virginia and the Superintendent of State Police (Virginia) under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., the Crime Control Act of 1973, as amended, 42 U.S.C. § 3766(c)(1), and 42 U.S.C. §§ 1981 and 1983, claiming that Virginia engaged in a pattern and practice of employment discrimination. The Government alleged race and sex discrimination against applicants for sworn trooper positions and

race discrimination in hiring civilians.

The District Court dismissed the Title VII and constitutional claims by its Order of April 7, 1977. Trial was conducted and completed in February, 1978 on the merits of the Crime Control Act (Act) claims, the anti-discrimination provisions of which became effective July 1, 1973.

The District Court issued its liability opinion on July 24, 1978, finding that since the effective date of the Act Virginia had not discriminated against black applicants for trooper positions or civilian positions, with the exception of black applicants for the civilian position of dispatcher who had been affected by the adverse impact of written examinations required up until March, 1976. The Court also found that female trooper applicants had been discriminated against as a result of the adverse impact of a height and weight requirement in place until March, 1976 and by Virginia's failure to more actively recruit

female trooper applicants.

In all other respects, it was the judgment of the Court that Virginia had not engaged in unlawful discrimination against black or female applicants.

The District Court found the written test for trooper applicants to be lawful as a result of its significant correlation with training and training school performance. In applying the principles of Washington v. Davis, 426 U.S. 229 (1976), the District Court concluded that Virginia's showing that the written test was a valid predictor of training school performance "sustain[ed] its burden of proof under Griggs as interpreted by Washington v. Davis." App. B, at 44. The District Court did not, therefore, address the evidence in the record pertaining to the relationship between performance in the training program and actual performance on the job.

Similarly, the District Court found that Virginia's use of a background investigation for

applicants for trooper showed no pattern or practice of discrimination. Specifically, the Court concluded that:

> "[c]onsidered as a whole the background investigations adduced by the plaintiff do not show a pattern or practice of racial discrimination. Nor do any of the individual background investigations reveal racial discrimination against any individual applicant. The defendant has in every case met its burden to 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.' McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The plaintiff has not shown that the legitimate reasons stated by the defendant and found by the Court in this case were mere pretexts for racial discrimination." App. B, at 71.

With respect to civilian employees, except dispatchers, the District Court determined that the Government failed to prove that Virginia had engaged in any unlawful discrimination.[1]

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[1]The District Court treated civilian dispatchers separately from other civilian employees. The District Court's finding that Virginia discriminated in hiring dispatchers was based upon the requirement that dispatchers take a written test shown to have adversely affected blacks. Other civilian employees were not required to take this written test.

On September 15, 1978, the District Court issued an order on relief and enjoined Virginia from future discrimination against any female applicant for the position of trooper or any black applicant for the position of dispatcher. The order also required that all previous victims of discrimination be identified and remedied, and required, as a further remedial measure, expanded recruitment of female trooper applicants and black dispatcher applicants. In connection with the recruitment required, the Court directed the establishment of a line item in Virginia's budget for such recruitment efforts and ordered Virginia to appoint two additional State Police recruiters. Quarterly reports to the Court on remedial efforts were also required.

The Government appealed from the liability order on September 22, 1978, to the United States Court of Appeals for the Fourth Circuit. Virginia cross-appealed from the liability order and

appealed the relief order on October 6, 1978. The United States, on November 8, 1978, cross-appealed from the relief order. These appeals were consolidated.

The Court of Appeals, in an opinion dated April 17, 1980, affirmed in part and reversed in part the decision of the District Court, reinstated claims under Title VII of the Civil Rights Act of 1964, and remanded this case for further consideration of certain issues in light of Title VII. Specifically, the Court of Appeals directed the district court to reconsider the written tests in light of applicable EEOC guidelines. In addition, the Court directed the District Court to "consider in light of those guidelines the charge that the background investigations used by the Commonwealth served as a pretext for eliminating black applicants...." (Emphasis added) See App. A, at 11-12.

Finally, without finding that the District

Court had made any error in considering the evidence on civilian hiring, the Court of Appeals directed the District Court on remand to permit the Government's further development of its statistical evidence which had, at trial, failed to prove a prima facie case of discrimination under Hazelwood School District v. United States, 433 U.S. 299 (1977).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THIS CASE PRESENTS THE OPPORTUNITY FOR THIS COURT TO ELIMINATE CONFUSION WHICH NOW EXISTS IN THE FEDERAL COURTS CONCERNING THE PROPER APPLICATION OF WASHINGTON V. DAVIS AND THE PRINCIPLES OF TRAINING SCHOOL VALIDATION IN TITLE VII ACTIONS.

The Government alleged that Virginia's preemployment tests for the position of trooper were unlawfully discriminatory. The District Court found, however, that these tests were valid predictors of success in training and in the training school (App. B, at 45) and concluded, therefore, that the tests were lawful in accordance

with the job relatedness requirements of Title VII as interpreted by this Court in Washington v. Davis, 426 U.S. 229 (1976). As stated in Davis:

> "This conclusion of the District Judge that training program validation may itself be sufficient is supported by regulations of the Civil Service Commission, by opinion evidence placed before the District Judge and by the current views of the Civil Service Commissioners who were parties to the case. Nor is the conclusion foreclosed by either Griggs or Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); and it seems to us the much more sensible construction of the job relatedness requirement.

Id. at 250-51.

In concluding that it is sufficient to show the job relatedness of a test by demonstrating that it predicts training and training school performance, the District Court did not find it necessary to discuss Virginia's proof of a significant relationship between performance in the training program and actual performance on the job. It did find, however, that the Virginia State Police training program was an important prerequisite to permanent employment in sworn

positions. Specifically, the evidence established:

> "that the successful completion of the training program is a requirement for the job of trooper, that the training school entails approximately 1,000 hours of study over a period of more than twenty weeks, that the cost of training a new trooper is somewhere between $19,000 and $20,000, and that the attrition rate in the training school has increased sharply since the written test was dropped in 1975." App. B, at 43-44.

This evidence reinforced the Court's opinion that Virginia's demonstration that the written test was a valid predictor of training school performance "sustain[ed] its burden of proof under Griggs as interpreted by Washington v. Davis." App. B, at 44.

On appeal to the Fourth Circuit, however, the Government disputed the trial court's interpretation of Davis and argued that in addition to showing that the tests correlate with training school performance, Title VII requires proof that such performance be shown to be a valid predictor of success on the job. That interpretation, however, is inconsistent with the majority opinion

in Davis in which a positive correlation between a preemployment test and the police training program was found sufficient to validate the test without any showing that the test predicted job performance. Indeed, as Justice Brennan observed in his dissenting opinion in Davis, petitioners' "validity study was unable to discern a significant positive relationship between training averages and job performance" and the "record is devoid of proof" of a positive relationship between the recruit school average and job performance. Id. 262, 267.

While some support for the Government's position is found in several recent court of appeals decisions, those decisions are in apparent conflict with the opinions of a number of other courts. Compare Ensley Branch of N.A.A.C.P. v. Seibels, 616 F.2d 812, 819-22 (5th Cir. 1980); Harless v. Duck, ___ F.2d ___, 22 EPD ¶ 30871 (6th Cir. 1980); and Blake v. City of Los Angeles, 595

F.2d 1367, 1382 n.17 (9th Cir. 1979), cert. denied, ____ U.S. ____, 48 U.S.L.W. 3698 (1980); with United States v. South Carolina, 445 F.Supp. 1094, 1113 (D.C. 1977) (three judge court), aff'd mem., 434 U.S. 1026 (1978); Image of Gr. San Antonio, Texas v. Brown, 570 F.2d 517, 520-521 (5th Cir. 1978); United States v. City of Chicago, 549 F.2d 415, 431-32 (7th Cir. 1977); Richardson v. McFadden, 540 F.2d 744, 748 (4th Cir. 1976); and United States v. City of Buffalo, 457 F.Supp. 612, 622 n.6 (W.D. N.Y. 1978).

These decisions indicate the degree of confusion which now exists in the federal courts concerning the proper interpretation and application of Washington v. Davis in Title VII cases. At stake is the ability of police departments across this country to utilize preemployment tests in screening applicants for the minimum skills required to enter training schools. Such schools are used extensively and, as in this

case, often involve a cost of thousands of dollars per recruit and the investment of many weeks of intensive instruction. As this Court found in Davis:

> "The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands and attempting to impart a modicum of required skills seems conceded. It is also apparent to us as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential to satisfactory progress in the training regimen."

426 U.S. at 250-51.

Given the practical significance of the question of training school validation, it is important that confusion over application of Washington v. Davis in Title VII cases be resolved. This case presents a particularly appropriate opportunity for such clarification. In finding that Virginia's written tests were valid, the District Court applied Washington v. Davis in determining whether Title VII standards and EEOC guidelines had been met. App. B, at 41-47. The

Court of Appeals, therefore, erred in directing the District Court to reconsider the test issue in light of those standards. Moreover, in remanding for reconsideration under Title VII, the Court of Appeals provided no guidance as to whether training school validation meets Title VII requirements. The only direction given the District Court was that it retrace the very steps it has already thoroughly covered. Without clarification from this Court, great confusion over the proper application of Davis will continue and law enforcement agencies throughout the nation will remain in doubt as to the proper legal standards for assessing the suitability of written preemployment tests.

II.

THE COURT OF APPEAL'S DECISION ENCOURAGES UNENDING PIECEMEAL LITIGATION PERMITTING THE ERRORS OF TRIAL COUNSEL TO BE REMEDIED BY THE GRANTING OF A NEW TRIAL

The Government attempted to prove Virginia discriminated racially in hiring civilian employees

by means of statistical evidence comparing the percentage of black civilian employees with the percentage of blacks in the statewide population. The District court concluded from the record that certain civilian jobs required specialized qualifications. Relying upon Hazelwood School District v. United States, 433 U.S. 299 (1977), the District Court correctly found that the Government's use of general population statistics instead of qualified labor market data was not sufficient to prove racial discrimination in respect to these skilled positions. App. B, at 23. With respect to civilian positions not requiring specialized qualifications, the percentage of blacks employed by Virginia compared favorably with the percentage of blacks in the general population. App. B, at 26. Thus, the District Court properly concluded from all the evidence that the Government failed to prove discrimination in hiring civilian employees.

The Court of Appeals found no error in the District Court's analysis of the evidence relating to these civilian positions.[2] Nor did it find that the District Court had improperly excluded any evidence offered by the Government in support of its claims. Nevertheless, in remanding the case, the Court of Appeals instructed that the Government should "be permitted to develop further the statistical data bearing upon the alleged discrimination against black applicants for civilian positions." App. A, at 14. In effect, under the terms of the Court of Appeals' decision, the Government would be permitted on remand to attempt to cure basic deficiencies in its statistical proof presented at trial. This result

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[2]In fact, the Court of Appeals carefully explained its views on the proper application of Hazelwood as set forth in its decision in E.E.O.C. v. Radiator Specialty, 610 F.2d 178 (4th Cir. 1979). App. A, at 12-13. The District Court's analysis under Hazelwood follows precisely the Court of Appeals' views in Radiator Specialty. App. B, at 19-29.

is contrary to settled principles of appellate procedure established by this Court.

Where the trial court has not improperly excluded proferred evidence and there is no error in its findings from the evidence presented, an appellate court should not remand to permit a party to adduce additional evidence in support of its case. Cf. Byrd v. Blue Ridge Elec. Co-op., Inc., 356 U.S. 525, 533 (1958); United States v. Shotwell Mfg. Co., 355 U.S. 233, 244 (1957). The decision of the Court of Appeals in this case directly contravenes these settled principles.

Moreover, practical considerations of importance to employers and the judicial system are jeopardized by the Court of Appeals' approach in this case. The Government filed this suit following a three year investigation of Virginia's employment practices in December, 1976 and engaged in more than year of intensive discovery. During that time it had access to Virginia's records

describing its civilian positions as well as the required skills and qualifications for those jobs. As the District Court found, mere reference to the job titles of many positions alone signaled the existence of specialized qualifications. Hazelwood was decided in June, 1977, thereby fully apprising the Government that where specialized qualifications are required discrimination could not be proved by reliance general population statistics. Yet during an eleven day trial in January and February, 1978 the Government chose not to present the qualified labor force statistics which were clearly required under Hazelwood. Under these circumstances there is no justification for permitting the Government, on remand, to adduce additional labor market statistics.[3]

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[3]The District Court, in discussing the Government's failure to introduce the appropriate statistics, observed that re-opening the record for further proof was unwarranted since the Government had every opportunity to adduce the required evidence at trial. App. B, at 84-85, n. 10.

Pattern and practice discrimination litigation characteristically involves lengthy and costly discovery as well as complex trial preparation and proof. These burdens fall heavily upon the employer who is usually the object of the bulk of discovery. The employer defendant, therefore, has a legitimate interest in reasonably foreseeable limits on such litigation. Where the Government fails to present evidence essential to its claims at trial the employer defendant should not be required to defend in a second trial on remand while the Government belatedly attempts to prove its case. Byrd v. Blue Ridge Elec. Co-op., Inc.; United States v. Shotwell Mfg. Co., supra. Allowed to stand as precedent, the Court of Appeals decision sanctions unending piecemeal litigation where errors of trial counsel will be remedied by the appellate courts granting new trials.

III.

THE COURT OF APPEAL'S DECISION MISAPPLIES EEOC GUIDELINES TO CLAIMS OF INTENTIONAL RECONSIDERATION DISCRIMINATION AND REQUIRES RECONSIDERATION OF THE RECORD WHERE THERE HAS BEEN NO FINDING OF ERROR.

The Government sought to prove that Virginia used its employment background investigation as a means of intentional racial discrimination. It offered as evidence of its claim comparison of numerous background investigation reports of black applicants denied employment and white applicants that were hired. After an exhaustive review of each alleged example of discrimination presented by the Government the District Court concluded that:

> "[c]onsidered as a whole the background investigations adduced by the plaintiff do not show a pattern or practice of racial discrimination. Nor do any of the individual background investigations reveal racial discrimination against any individual applicant. The defendant has in every case met its burden to 'articulate some legitimate, nondiscriminatory reason for the employees' rejection.' McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The plaintiff has not shown that the legitimate reasons stated by the defendant and found by the Court in this case were mere

pretexts for racial discrimination." App. B, at 71.

The Court of Appeals found no error in the District Court's assessment of this evidence. Nevertheless, the Court of Appeals directed the District Court on remand to "consider in light of [EEOC] guidelines the charge that the background investigations used by the Commonwealth served as a pretext for eliminating black applicants...", citing McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 801 (1973). (Emphasis added.)

It is clear that the District Court did, in fact, carefully consider the question whether the background investigation was used as a pretext for intentional race discrimination. The Court of Appeals' instructions to again consider the same evidence on that issue is clearly improper where there has been no finding of error by the District Court. Moreover, the Court of Appeals' direction to reconsider this evidence in light of EEOC guidelines is inappropriate, since those guidelines

have no direct application to cases of alleged intentional discrimination involving disparate treatment. See App. F.

CONCLUSION

For all the foregoing reasons, Virginia prays that a Writ of Certiorari issue to review the judgment and decisions of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Moore, Assistant Attorney General of Virginia, a member of the Bar of the Supreme

Court of the United States and one counsel for the Petitioners in the above-captioned matter, hereby certify that three (3) copies of this petition have been served upon counsel for all parties required to be served by depositing the same in the United States Post Office with first class postage prepaid this 2nd day of September, 1980.

James E. Moore
Assistant Attorney General

APPENDIX

A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1764

UNITED STATES OF AMERICA, Appellant,

versus

COMMONWEALTH OF VIRGNIA,
COLONEL DENNY M. SLANE, Appellees.

NO. 78-1765

UNITED STATES OF AMERICA, Appellee,

versus

COMMONWEALTH OF VIRGINIA,
COLONEL DENNY M. SLANE, Appellants.

NO. 78-1840

UNITED STATES OF AMERICA, Appellant,

versus

COMMONWEALTH OF VIRGINIA,
COLONEL DENNY M. SLANE, Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond, D. Dortch Warriner, District Judge.

Argued December 3, 1979 Decided April 17, 1980

Before HAYNSWORTH, Chief Judge; BUTZNER, Circuit Judge, and FIELD, Senior Circuit Judge.

Vincent F. O'Rourke, Jr., Dept. of Justice (Brian K. Landsberg, Walter W. Barnett, Irving Goldstein, Dept. of Justice; Drew S. Days, III, Assistant Attorney General; William B. Cummings, United States Attorney on brief) for the United States; James Moore and Leonard L. Hopkins, Jr., Assistant Attorneys General (Marshall Coleman, Attorney General of Virginia on brief) for the Commonwealth of Virginia and Colonel Denny M. Slane.

FIELD, Senior Circuit Judge:

This case involves the application of Title VII of the Civil Rights Act of 1964, as amended,[1] and the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1978, as amended,[2] in a suit instituted by the United States against the Commonwealth of Virginia and the Superintendent of the Virginia State Police. The United States charges that the Commonwealth engaged in a "pattern and practice" of discrimination against black applicants for civilian positions with the state police and against both black and women applicants for trooper positions.

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1. Title 42 U.S.C. § 2000e-2 provides in part:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual * * * because of such individual's race, color, religion, sex or national origin.

2. Title 42 U.S.C. § 3766 provides in part:

> (c)(1) No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any program or activity funded in whole or in part with funds made available under this chapter.

The Virginia State Police is partially funded under the Crime Control Act.

The basic employment requirements for state troopers in Virginia prior to March, 1976, included, inter alia, that an applicant (1) be between 21 and 29 years of age; (2) be at least 5'9" and weigh at least 156 pounds; (3) be a graduate of an accredited high school (or the equivalent); (4) be a licensed driver with a good record; (5) undergo a thorough background investigation; and (6) pass three written mental ability tests. Applicants for civilian dispatcher positions also had to complete the written examinations. The requirements for other civilian positions varied, but all applicants were subject to a background investigation. Final employment decisions for all positions were made by the Superintendent of State Police.

The United States conducted a three-year investigation of these hiring practices which led to the filing of this suit in the Eastern District of Virginia. The investigation revealed that the Commonwealth hired no black troopers from its inception until 1969, and that from 1972 until 1976 only 3.3 percent of the new troopers employed were black. No black applicants were selected for any of the eighty-five dispatcher positions until 1977, and the blacks employed in the remaining civilian jobs were relegated to lower paying and less desirable positions. Women were also found to be under represented in the force with only three women applicants for trooper positions offered employment by the time of trial.

Upon pretrail motion by the Commonwealth, the disrict court dismissed the Title VII claims since this suit was instituted by the Attorney General rather than by the Equal Employment Opportunity Commission (EEOC) as required by federal statute. The case came to trial based solely on alleged violations of the Crime Control Act. The court

found for the United States on allegations that the Commonwealth discriminated against women applicants for trooper positions[3] and against blacks for civilian dispatcher positions.[4] The court further found that prior to July 1, 1973, the Commonwealth discriminated against blacks for all other positions, but since the anit-discrimination provisions of the Crime Control Act did not take effect until that date, the district court ruled for the Commonwealth on the remaining charges.[5] The district court declined to apply the EEOC

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3. The sex discrimination violation was based upon the State Police requirements that an applicant must be 5'9" in height and weigh at least 156 pounds. The plaintiff's evidence demonstrated that these requirements would eliminate 98% of all women. The height and weight requirements were voluntarily dropped by the Commonwealth in July, 1976.

4. Black applicants for dispatcher positions were required to take the same written exam taken by applicants for trooper positions. The court found that the test had an "adverse impact" on blacks and was not a valid predictor of job performance. This employment requirement is no longer used by the State Police in selecting dispatchers.

5. Much of the statistical data relied upon by the United States to demonstrate a prima facie case of discrimination against black applicants for trooper and civilian positions was discarded as inaccurate by the district court. The court also rejected the United States' evidence of intentional discrimination.

guidelines[6] applicable to the possible discriminatory nature of the written examinations. The court also rejected certain statistical evidence offered by the United States, and perceived no reason to impose mandatory quotas to remedy past discrimination.

Upon appeal, the United States challenges the district court's dismissal of the Title VII claims, its rejection of the statistical evidence and the failure to apply appropriate EEOC guidelines. The Government also appeals from the district court's refusal to impose quotas. The Commonwealth cross-appeals from the liability and remedial conclusions of the district court, including its ruling that the United States was not required to prove intentional discrimination to establish a prima facie case.

Dismissal of the Title VII Claims

By pretrial order filed April 8, 1977, the district court dismissed the Title VII claim, relying upon 41 U.S.C. § 2000e-6(e)[7] to hold that

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6. The EEOC issues professionally prepared guidelines to be used to determine whether employment tests are job related. These guidelines are the "administrative interpretation of the Act by the enforcing agency." Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971).

7. Title 42 U.S.C. § 2000e-6 provides in part:
Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission *** unless the President submits *** a reorganization plan ***.

the Attorney General was without authority to maintain a Title VII action since this power had been transferred to the EEOC. Subsequent to this dismissal order of the district court, however, on February 23, 1978, the President submitted to Congress "Reorganization Plan No. 1 of 1978," under which full and complete authority to initiate Title VII actions was transferred to the Attorney General. The Plan was approved by Congress and was made effective as of July 1, 1978. In United States v. North Carolina, 587 F.2d 625 (1978), cert. denied 99 S. Ct. 2820 (1979), we concluded that Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974), required that we recognize and apply the law with respect to this transfer of authority in a case which was pending on appeal on the effective date of the Plan. Accordingly, we must remand this case to the district court for further consideration in the light of Title VII.

Title VII Standards Applicable to State Governments

Although the district court improperly dismissed the Title VII claim, it correctly employed Title VII standards in interpreting the anti-discrimination provisions of the Crime Control Act. H.R. Rep. No. 94-1723, 94th Cong., 2d Sess., reprinted in [1976] U. S. Code Cong. & Ad. News 5418. The court held that under Title VII standards, the United States was not required to prove intentional discrimination to establish a prima facie case, but only that the employment practices of the defendants had an "adverse impact" on both black and women applicants for employment. This was based on Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which the Court determined that a prima facie case could be demonstrated by establishing that an employment practice had an

"adverse impact" on black employees whether intended or not. If the plaintiff successfully proves that an employment practice has an "adverse impact," on minority applicants, the employer then has the "burden of showing that any given requirement *** [has a] relationship to the employment in question." 401 U.S. at 432. The Commonwealth contends that the "adverse impact" test applies only to private employers and that this is an improper test when Title VII standards are applied to state government employers. Relying upon Washington v. Davis, 426 U.S. 229 (1976), the defendants argue that intentional discrimination must be proven to establish a prima facie case against a state. Davis involved a suit which challenged employment practices of the police force of the District of Columbia, alleging racial discrimination in violation of the Due Process Clause of the Fifth Amendment. The written tests used by the police force eliminated a large portion of the black applicants for police positions. The Court held that the discriminatory impact of a policy alone was not enough to demonstrate a prima facie case under the Fifth Amendment, but that intentional discrimination must be shown. The Commonwealth contends that such a showing of intentional discrimination is required in the present case. Davis, however, does not support the Commonwealth's argument since the Court made it clear that in Davis its cconsideration was confined to Fifth Amendment principles and indicated that unlike the Amendment, Title VII does not require proof of intentional discrimination.

Unquestionably, Congress was mindful of the Griggs "adverse impact" standard applicable to private employers when it amended Title VII in 1972 to include state and local governments as employers under the Act; and the legislative history clearly indicates that the standards to be applied to the

Commonwealth under the 1972 amendments are the same Title VII standards which were earlier made applicable to private employers. Dothard v. Rawlinson, 433 U.S. 321, 331 n. 14 (1977); see H.R. Rep. No. 97-238, reprinted in [1972] U. S. Code Cong. & Ad. News 2152.

Although the Supreme Court has not directly addressed the application of the adverse impact standard to state governments, the Court has determined that Congress had authority under § 5 of the Fourteenth Amendment to "extend [Title VII] coverage to the states as employers." Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n. 9 (1976). Section 5 grants Congress the power to "enforce [the equal protection clause of the Fourteenth Amendment] by appropriate legislation." U.S. Const. amend. XIV, § 5. The only question is whether the "adverse impact" standard mandated by Congress in the 1972 amendments to Title VII and applied by the district court below is appropriate legislation under § 5 of the Fourteenth Amendment.

In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court stated that Congress was authorized to pass legislation, consistent with the Constitution, which was plainly adapted to the enforcement of the equal protection clause of the Fourteenth Amendment. Congress was granted discretion to determine "what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U.S. at 651. Although this discretion is not unlimited, it is within congressional authority to extend the safeguards against discrimination to employees of state and local governments. United States v. City of Chicago, 573 F.2d 416, 423 (7 Cir. 1978). We agree with the Ninth Circuit that the 1972 amendments making the Griggs standard applicable to state employers "are rationally related to the goal [of prohibiting] discrimination" and "consistent

with the letter and spirit of the Constitution." Blake v. City of Los Angeles, 595 F.2d 1367, 1373 (9 Cir. 1979). Accepting this constitutional premise, we are in accord with those courts who have held that Title VII applies the Griggs impact standard to both public and private employees. See Scott v. City of Anniston, 597 F.2d 897 (5 Cir. 1979); Firefighters Institute, Etc. v. City of St. Louis, 549 F.2d 506 (8 Cir. 1977), cert. denied 434 U.S. 819 (1978); United States v. State of South Carolina, 445 F.Supp. 1094 (D.S.C. 1977), aff'd mem. 434 U.S. 1026 (1978).

Violations of the Crime Control Act

We agree with the district court that the United States presented sufficient evidence to demonstrate that the Commonwealth's employment practices had an adverse impact on black applicants for dispatcher positions. The district court found that the written examinations used by the state police to fill these positions had no valid correlation with job performance. Under Griggs, once the adverse impact was established, the burden passed to the Commonwealth to demonstrate that the test had a rational basis and was validated in terms of job performance. The Commonwealth did not attempt to show that the test was significantly related to job performance, but argues that since the number of black applicants affected was small, the United States has failed to demonstrate a pattern and practice of discrimination. The question, however, is not the number of applicants which were affected, but rather whether the United States established "by a preponderance of the evidence that racial discrimination was the [Commonwealth's] standard operating procedure--the regular rather than the unusual practice." Teamsters v. United States, 431 U.S. 324, 336 (1977).

The district court also determined that the former height and weight requirements had an adverse impact on female applicants. The evidence presented by the Commonwealth did not demonstrate the need for these physical requirements, and without such justification, the court properly concluded that the height and weight standards were improper under Griggs. Dothard v. Rawlinson, supra, 433 U.S. 321.

The principal allegations of discrimination against black applicants for trooper positions were (1) that written tests used by the state police had an adverse impact on black applicants, and (2) that background investigations of applicants constituted intentional discrimination. The district court found that the written test had an adverse impact upon blacks and that it had not been shown to be a valid predictor of job performance. The court did, however, find, on the basis of the evidence presented, that the test, in fact, was a valid predictor of training school performance, and relying upon Washington v. Davis, supra, 426 U.S. 229, held that its use by the state police was not an unlawful or discriminatory employment practice. The court further found that the test was not a subterfuge for racial discrimination. In Davis the Court held that a positive relationship between the test and training-course performance was a sufficient validation under standards similar to those of Title VII. 426 U.S. at 250. While the evidence presented to the district court was sufficient to support its conclusion under Davis, upon remand the court should reconsider this issue in the light of the applicable EEOC guidelines to deterine whether a contrary conclusion is required. Similarly, the district court should consider in the light of those guidelines the charge that the background investigations used by the Commonwealth served as a pretext for eliminating black

applicants or whether there was "some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). See EEOC v. United Virginia Bank/Seaboard National, No. 78-1022 (4 Cir. January 24, 1980). In directing that these charges be further considered, we express no opinion with respect to the merits or ultimate disposition of them.

Discrimination in Civilian Hiring

The United States also alleges that the Commonwealth violated the Crime Control Act by discriminating against black applicants for civilian positions with the state police. This allegation was based to some degree upon statistical evidence that the proportion of blacks hired for such civilian positions was significantly less than the proportion of blacks in the available state work force as a whole. The district court rejected this statistical analysis since many of the civilian positions such as clerk-stenographer, computer programmer, and clerk-typist, require skills that may not be possessed or readily acquired by the general population. Accordingly, the court determined that the United States had failed to prove a prima facie case under Hazelwood School District v. United States, 433 U.S. 299 (1977), in which the Court stated that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Id., at 308 n. 13.

In Equal Employment Opportunity v. Radiator Specialty, 610 F.2d 178 (4 Cir. 1979), we had occasion to consider the practical implications of

Hazelwood. Writing for the court, Judge Phillips recognized "the critical importance of establishing the existence or non-existence of special job qualifications when general population statistics are offered as the base data to prove a prima facie case based on gross racial disparities in employment," Id., at 184, and identified three general classifications of job positions for the purpose of statistical proof in a Title VII case such as this. First are those in which it is manifest from the mere identification of the job positions in question that no special qualifications exist as a matter of law. In such cases, general population statistics are appropriate in assessing a plaintiff's prima facie proof. Second are those in which it is equally manifest that special qualifications do exist, and in such a case a plaintiff will ordinarilly be required to produce specially qualified market statistics in an attempt to establish a prima facie case. Finally, are those cases in which it will not be manifest as a matter of law simply from the identification of the job position whether or not special qualifications are required, and in such cases the burden rests upon the defendant to establish that the positions, in fact, do require special qualifications not possessed or readily acquired by the general population. If the defendant carries this initial burden, then the plaintiff should have the opportunity to present statistical proof to reflect a labor pool base possessing such special qualifications.

Upon remand the parties and the court should address themselves to each civilian job classification in the State Police to determine which positions, if any, require special qualifications and, based upon this threshold determination, the appropriate statistical proof required under Radiator Specialty.

CONCLUSION

As we have noted, on remand the district court should consider the charges of discrimination made by the United States in the light of Title VII, and incident thereto, we note that even though some Title VII standards were applied by the district court, it considered only those alleged violations which occurred on or after July 1, 1973, the effective date of the anti-discrimination provisions of the Crime Control Act. Since Title VII became applicable to state and local governments on March 24, 1972, the district court should consider possible violations which occurred during that sixteen month period. As we have noted, the United States should also be permitted to develop further the statistical data bearing upon the alleged discrimination against black applicants for civilian positions. We express no opinion in regard to any rememdial steps since any remedy, of necessity, will depend upon the findings of the court on the several charges of discrimination.

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 78-1764

United States of America,

Appellant,

versus

Commonwealth of Virginia,
Colonel Denny M. Slane,

Appellees.

No. 78-1765

United States of America,

Appellee,

versus

Commonwealth of Virginia,
Colonel Denny M. Slane,

Appellants.

No. 78-1840

United States of America,

Appellant,

versus

Commonwealth of Virginia,
Colonel Denny M. Slane,

Appellees.

O R D E R

Upon consideration of the Commonwealth of Virginia's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Field for a panel consisting of Judge Haynsworth, Judge Butzner, and Judge Field.

For the Court,

William K. Slate, II
Clerk

June 3, 1980

APPENDIX

B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	CIVIL ACTION
	:	NO: 76-0623-R
COMMONWEALTH OF VIRGINIA	:	

O R D E R

In accordance with the memorandum this day filed, it is the judgment of this Court that defendant has engaged in an unlawful and discriminatory hiring pattern or practice in that it maintained a height and weight requirement which discriminated against women applicants and it failed actively to recruit women for sworn positions on the Virginia State Police after the effective date of the Crime Control Act of 1973. Further, it is the judgment of this Court that the defendant engaged in an unlawful and discriminatory hiring pattern or practice in that the Virginia State Police used a written test as a screening device for applicants for the position of dispatcher which discriminated against black applicants for the position of dispatcher in violation of the Crime Control Act of 1973.

In all other respects, it is the judgment of this Court that the defendant has not engaged in any pattern or practice of unlawful discrimination against black applicants or female applicants.

The plaintiff shall submit its brief on the question of appropriate relief within fifteen days on the entry of this order. Defendant shall have ten days from the filing of the plaintiff's brief

to reply. Plaintiff's rebuttal shall be filed within five days thereafter.

And it is so ORDERED.

Let the Clerk send a copy of this order and the memorandum to all counsel of record.

D. Dortch Warriner
United States District Judge

Date: 24 July 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINA
RICHMOND DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	CIVIL ACTION
	:	NO: 76-0623-R
COMMONWEALTH OF VIRGINIA	:	

MEMORANDUM

I

On 23 December 1976 the United States brought suit in this Court against the Commonwealth of Virginia and the Superintendent of the Virginia State Police[1] to enforce the provisions of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq. and of § 518(c)(1) of the Omnibus Crime Control and Safe Streets Act of 1968 as amended, 42 U.S.C. § 3766(c)(1), and to protect certain rights guaranteed by the Constitution. By order entered 7 April 1977 plaintiff's claims under the Constitution and under Title VII were dismissed, and the action proceeded to trial on the merits of plaintiff's claim under the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter referred to as the Act).

The United States alleged that the Commonwealth of Virginia has discriminated against black applicants for civilian positions and against both black and female applicants for sworn positions in the Virginia State Police. The State Police is denominated a program or activity funded in part with Law Enforcement Assistance Administrative (LEAA) funds made available under

Chapter 46 of Title 42 of the United States Code, 42 U.S.C. §§ 3701, et seq.

The Crime Control Act of 1973 amended Section 518 of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3766, to include for the first time a prohibition against, inter alia, racial and sexual discrimination by recipients of funds under the Act. Section 3 of the Crime Control Act of 1973, Pub. L. No. 93-83, provided that the anti-discrimination amendments would take effect on 1 July 1973. Thus, only those acts of discrimination which took place after 1 July 1973 will support a finding of discrimination in violation of § 3766(c). See Hazelwood School District v. United States, 433 U.S. 299, 309 (1977). Evidence of pre-Act discrimination is nonetheless relevant to this case. Hazelwood, supra at 309-10, n. 15. A showing of pre-Act discrimination would give meeting to post-Act patterns and practice of the defendants.

The Court finds that prior to 1 July 1973 the Virginia State Police discriminated against black applicants for civilian positions and against both black and female applicants for sworn positions. The practice of discrimination against female applicants for sworn positions was readily admitted by Captain Meredith S. Urick, who was Personnel and Training Officer for the Virginia State Police from the late 1940's until his retirement on 1 April 1972. Tr. 5-48. The discrimination against blacks in hiring for sworn and unsworn positions is not admitted by defendants, but is shown by the evidence nonetheless.

The statistical evidence of pre-Act discrimination is substantial. The evidence of the hiring of blacks by the Virginia State Police prior to 1969 consists of what the Supreme Court and the

Fifth Circuit have termed "the inexorable zero." Teamsters v. United States, 431 U.S. 324, at 342, n. 23 (1977), quoting from United States v. T.I.M.E.-D.C., 517 F.2d 299, at 315 (5th Cir. 1975). In the entire history of the Virginia State Police, only four blacks had ever been hired as troopers before 1973. No blacks had been hired prior to 1969. Plaintiff's Exhibit 21A. Plaintiff's Exhibit 8 is a list of 172 black applicants for trooper positions who applied between 1950 and 1972. Although this number is small in proportion to those who applied for trooper positions in this period, it is a substantial number and none were hired.

The statistical evidence of pre-Act discrimination is substantial. See Roman v. ESB, Inc., 550 F.2d 1343, 1350 (4th Cir. 1976). When coupled with the direct evidence of discrimination, a prima facie case of pre-Act discrimination is made. The defendant's evidence is insufficient as a matter of law to rebut the plaintiff's prima facie case. Teamsters v. United States, 431 U.S. 324, 342-3, n. 24 (1977), citing Alexander v. Louisiana, 405 U.S. 625, 632 (1972).[2] The Court finds that prior to the effective date of the Crime Control Act of 1973, that is, up until 1969, the Virginia State Police maintained an all-white trooper force by purposefully excluding blacks.

II

The Attorney General of the United States is empowered to bring suit under § 3766(c) whenever he has reason to believe a recipient government agency "has engaged or is engaging in a pattern or practice in violation of the provisions of this section." 42 U.S.C. § 3766(c)(3). Before proceeding to a detailed analysis of the evidence in this case, the Court must determine what legal

standard is appropriate to such "pattern or practice" suits under the Crime Control Act. We deal with a welter of overlapping and interrelated laws, regulations and court decisions which make it difficult to ascertain what burden of proof is imposed on the federal government in such cases.

The plaintiff contends that the legal standards applicable to suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e et seq., are intended by Congress to apply to this § 3766 case. This view is bolstered by the clear statement to that effect found in the conference report on Publ. L. No. 94-503, H.R. Rep. 94-1723, 94th Cong., 2d Sess. (1976). Plaintiff says that it follows that the legal standard to be applied to this case is the standard enunciated in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Under Griggs, proof of discriminatory motive is not necessary in a Title VII case where the plaintiff complains of facially neutral employment practices that exhibit a disparate racial impact.

Plaintiff points as well to the regulations promulgated under the Crime Control Act on 18 August 1972, almost a year before § 3766(c) became effective. These regulations impose on recipients a duty to "conduct a continuing program of self-evaluation to ascertain whether any of their...policies...directly or indirectly have the effect of denying equal employment opportunities to minority individuals and women." 28 C.F.R. § 42.306(a). This provision seems to contemplate remedies based on an adverse impact theory of discrimination. Congress did nothing to require a change in this regulation in 1973 when the anti-discrimination amendments were adopted nor in 1976 when the legislation was re-enacted. Therefore, the plaintiff argues, Congress must have

meant for the Griggs adverse impact standard to apply to cases under § 3766(c).

In Lau v. Nichols, 414 U.S. 563 (1973) the Supreme Court upheld the claims of the plaintiff class brought by non-English-speaking Chinese-American students against the San Francisco public schools under a regulation promulgated by HEW pursuant to Title VI of the Civil Rights Act of 1964 which regulation prohibited practices which had the effect of discriminating even though no discrimination was intended. 414 U.S. at 568. Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, concurred in the result but expressed doubt as to whether Title VI, standing alone, would sustain plaintiff's position were there no purposeful discrimination. However, the regulations which required affirmative action to overcome any language barriers were, Justice Stewart said, reasonably related to the purposes of the enabling legislation, and therefore binding on the defendant, 42 U.S at 569-71. In the present case, the regulation was not offered as a basis for liability but is here considered as a guide for the interpretation of the statute which followed it.[3]

Defendant, on the other hand, argues the rule of Washington v. Davis, 426 U.S. 229 (1976). Washington held that proof of discriminatory motive is necessary to establish a case of race discrimination under the Fifth Amendment (and by implication under the Fourteenth Amendment). Thus, defendant argues, mere disparate impact will not prove a case of discrimination under the Crime Control Act. Defendant arrives at this limitation by arguing that the anti-discrimination section of the Crime Control Act (42 U.S.C. § 3766(c)) was enacted by Congress under the authority of § 5 of the Fourteenth Amendment. Since Washington recognized limits on the Amendment itself, the

legislation adopted pursuant to the Amendment cannot exceed those same limits. Thus, if proof of motive is required to support a finding of liability under the Fourteenth Amendment; mere proof of disparate impact must be insufficient to support a finding of liability under § 3766(c), a statute enacted under the authority of that Amendment.

This Court considered a similar proposition in the context of Title VII in Friend v. Leidinger, 446 F. Supp. 361, 384-87 (E.D. Va. 1977). In Friend this Court decided that proof of discriminatory intent is indeed necessary to establish a case of race discrimination in employment under Title VII where the defendant is either a State or a subdivision of a State. Since Friend was decided, however, two cases have been decided which cast doubt on the analysis of the Court in Friend.

In United States v. City of Chicago, 573 F.2d 416 (7th Cir. 1978), the Seventh Circuit held that the legal standard of proving a claim under the Fourteenth Amendment is not incorporated into Title VII by virtue of Washington v. Davis. The court analyzed the analogous cases of Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959) and Katzenbach v. Morgan, 384 U.S. 641 (1966), dealing with English literacy tests for voting. In Lassiter the Supreme Court held that a North Carolina English literacy test did not necessarily violate the Fourteenth Amendment. In Katzenback v. Morgan the Supreme Court considered the constitutionality of § 4(e) of the Voting Rights Act, which prohibited states from using English literacy tests as a requirement of voting. The Court held that the prior decision in Lassiter was inapposite to the question of the validity of the Voting Rights Act, and the question presented was

instead whether the legislation was appropriate to enforce the Equal Protection Clause of the Fourteenth Amendment. 384 U.S. at 649-50. The Court held in the affirmative. The Seventh Circuit, by analogy, concluded that Title VII, including the impact standard of Griggs, was an appropriate means of enforcing the Fourteenth Amendment in the employment field even as against a State subdivision. 573 F.2d at 422-24.

The second case which considered the issue after Friend is United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977) (three-judge court), aff'd mem. ____ U.S.____, 46 U.S.L.W. 342 (January 16, 1978). In that case, a unanimous three-judge panel consisting of Haynsworth and Russell, Circuit Judges, and Simons, District Judge, discussed the impact of Washington v. Davis on employment cases under Title VII and concluded that Washington v. Davis did not disturb the application of Griggs and that employment practices which display an adverse impact must be shown to be valid even where the employer is a governmental entity. 445 F. Supp. at 1112.

These cases lead the Court to believe that Congress has the power under § 5 of the Fourteenth Amendment to apply the impact standard of employment discrimination to the States in Title VII cases.

In any case, the defendant's argument is based on the assumption that Congress in passing § 3766(c) was acting pursuant to its power under the Fourteenth Amendment. Plaintiff contends, and the Court agrees, that § 3766(c) is more likely based upon the Spending Clause of Article 1, Section 8, of the Constitution. In Lau v. Nichols, supra, the Supreme Court made it clear that Title VI, the model for § 3766(c), was a proper exercise

of the Spending Power: "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Oklahoma v. CSC, 330 U.S. 127 (1947). Whatever may be the limits of that power,...they have not been reached here." 414 U.S. at 569. The fact that the anti-discrimination provision is tied directly to a spending program also indicates that it is based upon the Spending Power. Either way, the defendant's argument fails.

In this same connection, however, it must be borne in mind that this is a "pattern or practice" suit brought by the Attorney General against an employer under § 3766(c)(3). Pattern or practice suits in the employment field trace their origins to the Dirksen-Mansfield amendments to the Civil Rights Act of 1964. 110 Cong. Rec. 12818-20 (1964). The Attorney General was authorized to bring a civil action against any employer who he has reasonable cause to believe "is engaged in a pattern or practice of resistance" to the rights secured by Title VII, "and that the pattern or practice is of such a nature and is intended to deny the full exercise" of Title VII rights. 42 U.S.C. § 2000e-6(a). (Emphasis added). Although this intent language is not found in § 3766(c)(3), which authorized this suit, the connection between Title VII and the anti-discrimination provisions of the Crime Control Act is so close that the intent language of § 2000e-6(a) may be imputed to § 3766(c)(3).[4]

The language of § 2000e-6(a) thus plainly contemplates purposeful discrimination as the basis for a suit by the Attorney General. As the Supreme Court has noted, "disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." Teamsters, 431 U.S. at 335, n. 15. In view of the very language of the statute this Court

is of the view that Congress did not intend to subject a governmental employer to liability in a suit brought by the Attorney General unless the employer were engaged in a widespread pattern and deliberate practice of thwarting the goals of Title VII. The courts have, however, applied the Griggs impact standard to pattern and practice cases under Title VII without such analysis.

In United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert. den., 406 U.S. 906 (1972), the Fifth Circuit held that the United States need not prove a specific present intent to discriminate in a pattern or practice suit. The court said:

> [T]he Act proscribes facially neutral practices perpetuating the effects of past discrimination. If the practices have racially determined effects, proof of subjective intent to discriminate is unnecessary; the Government must show only that the defendant intended to perform the discriminatory act. [451 F.2d at 443.]

In United States v. City of Chicago, 573 F.2d 416 (7th Cir. 1978) the Seventh Circuit considered a pattern or practice complaint against the fire department of Chicago, Illinois, brought by the Attorney General under Title VII. Without discussing the question of whether Congress intended that pattern or practice suits be brought against employers who had no discriminatory purpose, the court held that the Griggs standard should apply to the case, and that proof of discriminatory motive was unnecessary.

The Eighth Circuit also indicated by implication that discriminatory motive need not be proved in pattern or practice cases in Firefighters

Institute for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977). The court did not distinguish between the claims of the United States and those of the private plaintiffs when it held that discriminatory purpose need not be shown in Title VII cases brought under an adverse impact theory. 549 F.2d at 510.

Thus, although the Supreme Court has never considered in a State employee case the question of whether discriminatory intent is a necessary element of a prima facie case, the weight of the authority is that proof of impact alone is sufficient. This Court, then, will apply the standard of Title VII to this case with the Griggs impact theory rather than the Washington purposeful discrimination theory.

III

The Court will now proceed to examine the claims of discrimination raised by the complaint. These are three: sex discrimination in hiring for sworn positions with the Virginia State Police, race discrimination in hiring for civilian positions with the State Police, and race discrimination in hiring for sworn positions with the State Police.

The plaintiff has sought to prove both disparate treatment and the disparate impact of neutral standards to show that the Virginia State Police have engaged in sex discrimination in hiring trooper applicants. The disparate treatment case rests upon the miniscule number of females hired by the Virginia State Police, the testimony of two female applicants, the failure of the Virginia State Police to recruit females for trooper positions, and the persistence in use of a height and weight requirement for trooper applicants. The

plaintiff's case under a disparate impact theory is based upon the grossly disparate impact of the height and weight requirement on women.

The first female trooper was hired by the Virginia State Police in 1976. Until that time there had never been a woman State Trooper in Virginia. Clearly this is an example of "the inexorable zero." The number of women presently employed and seeking employment is so low that the plaintiff does not argue that the proportion of women in sworn positions of women in the civilian labor force in Virginia. Plaintiff does argue, however, that the number of women hired by the Virginia State Police would be substantially greater than it presently is in the absence of discrimination. Thus, the plaintiff's use of these statistics is in accord with the Supreme Court's view of the usefulness of such statistics found in Teamsters as proof of disparate treatment. 431 U.S. at 339, n. 20.

Plaintiff's testimonial evidence of disparate treatment is, on the other hand, very weak. In part it consists of the testimony of two female applicants for trooper positions, Barbara Penn and Wanda Ricciardelli.

Barbara Penn, then a secretary in the office of the Assistant United States Attorney, testified that she had an interview with a Lieutenant Abbott of the State Police in the latter part of September 1977. She testified that Lt. Abbott told her that it would take some time to process her application and that he didn't hold out much hope that they could process her application before her 30th birthday in March of 1978. He invited her to file an application nevertheless. Despite this indication that time was critical Miss Penn did not actually submit her application until several weeks

later. At the time of her testimony in February 1978, Miss Penn's application was being processed by the Virginia State Police. Tr. 1-164-69.

Wanda Ricciardelli testified that she applied to the Virginia State Police in January of 1977. In February, she received a letter notifying her that a freeze was in effect and that the State Police were not hiring at that time. In mid-May, Miss Ricciardelli was notified that she would not be offered employment by the Virginia State Police. She tried repeatedly to ascertain the reason for her rejection, but the State Police told her only that they couldn't release the reasons for her rejecton because they were confidential. She was, however, told that she had passed the age limit of 29 years in June of 1977 and that after that time, she was not eligible for employment. Miss Ricciardelli expressed doubt that this age problem was the only factor in her rejection. Miss Ricciardelli's testimony indicated that she had been hospitalized for an emotional disturbance in the spring of 1968 and that she had a problem with absences at her secretarial job in Philadelphia. Tr. pp. 3-37-47.

The Court does not believe that the evidence shows that either Miss Penn or Miss Ricciardelli was the victim of sex discrimination. When the Court asked counsel for plaintiff what was the relevance of Miss Penn's testimony, plaintiff's counsel said:

> We wanted to show Your Honor that there was an applicant, a female applicant, that we considered to be qualified, who was under a certain degree of time restraint and needed to be considered and was not considered and there's also, as I think the testimony will show from other witnesses, there is a class

approaching that is to be employed sometime in February --

THE COURT: Is it the position of the government that because she was a woman and she should have gotten particular treatment?

MR. WHITE: If you have a qualified female applicant and you're in an affirmative action posture to hire applicants, we consider that it might be advisable for the State Police to consider her application, knowing that her 30th birthday was approaching.

[Tr. 1-168-69.]

This exchange makes it clear that the plaintiff did not contend that Miss Penn was an explicit victim of sex discrimination. The purpose of the testimony of Miss Penn was to show that despite its paucity of female troopers, the State Police were unwilling to bend or waive the application process to recruit additional women. Adherence to such rules is not discrimination. Indeed, had defendant waived the rules because Miss Penn was a woman discrimination might well have been proven.

With respect to Miss Ricciardelli, the plaintiff presented no evidence beyond her own suspicion that she was rejected for a reason other than her age, i.e., because of her sex. Defendant argues that even if Miss Ricciardelli's age were not the reason for her rejection, sufficient other reason has been shown by Miss Ricciardelli's own testimony. The Court concurs. There is no evidence that the reasons advanced by the Virginia State Police for their rejection of Miss Ricciardelli are pretexts for sex discrimination. Accordingly, the Court finds that neither Miss Penn nor Miss Ricciardelli was the victim of sex

discrimination.

In juxtaposition to this testimony the defendant offered the testimony of Trooper Cheryl Nottingham. Trooper Nottingham was the first woman to be hired as a trooper by the Virginia State Police. She testified that she was not discriminated against in any way on account of her sex either in the application process or in the training process or as a working trooper. Indeed, Trooper Nottingham testified that she was encouraged to apply and become a State Trooper. Miss Nottingham applied for the job of trooper in August of 1976. Her 30th birthday came in October of that year.[5]

Plaintiff points to the alleged failure of the Virginia State Police actively to recruit women as evidence of intentional discrimination. The evidence shows that only 38 women applied for trooper positions with the Virginia State Police from 1973 through 1976. Defendant's Exhibit 110 and 111. This small number of female applicants, plaintiff contends, is the result of the admitted discrimination carried on by the State Police prior to 1973, coupled with the failure of the Virginia State Police to recruit women as a rememdial measure.

The evidence shows that virtually all of the recuiting efforts expended by the Virginia State Police have been aimed at recruiting black applicants. While it is true that Trooper Green testified that he has sought to recruit women applicants as well as black applicants, nevertheless, it is clear that the main thrust of his efforts has been at recruiting blacks. Colonel Slane testified that he hoped to add a female trooper to the recruiting team, but wouldn't be able to do so until a female trooper could graduate

and have some experience in the field. Tr. 10-147-48. The Virginia State Police has clearly made a policy decision that the best way to recruit for the kind of people they want is to send a trained and experienced trooper, who is a member of the group they seek to recruit, around to talk to prospective applicants. Thus, the lack of a trained and experienced female trooper in the Virginia State Police has resulted in a lack of recruiting for female applicants.

The record shows that the idea of women becoming State troopers is a relatively new one. Colonel Burgess, a police officer of 42 years standing, had never heard of females as troopers prior to 1970. Tr. 7-14. Nevertheless, the Court views the failure of the Virginia State Police after the effective date of the Act actively to recruit female applicants as evidence of sex discrimination against women on the part of the Virginia State Police.

The most telling evidence of sex discrimination, however, is the existence until 1976 of a height and weight requirement for trooper applicants for the Virginia State Police. Until July, 1976, an applicant for trooper with the Virginia State Police was required to be at least 5'9" tall and weigh 156 pounds. Plaintiff's evidence showed that these requirements disqualify more than 98% of all women while disqualifying only about half of all men. Plaintiff's Exhibit No. 16. Defendant's answer to the plaintiff's contention that this shows intentional discrimination against women is that the height and weight requirement was instituted and was in effect for many years prior to 1973. During this period the Virginia State Police admittedly would not consider any woman for employment as a State trooper. Her height and weight was no impediment - only her sex. Thus it

is specious to argue that the height and weight requirement was intended to exclude women.

Defendant also defends its height and weight requirement on grounds that the Federal Bureau of Investigation used a height and weight requirement for employing special agents until as late as June of 1975. Defendant does not argue that the FBI is incapable of discriminating against women. Instead, its argument is that the Virginia State Police was mindful that the FBI is an arm of the Attorney General of the United States and it reasonably assumed that the U. S. Department of Justice would not maintain the policy if it were prohibited by law. Defendant maintains that its reliance on the standards set by the FBI is evidence of good faith and the nondiscriminatory purpose of the Virginia State Police.

Recognizing that in years past no woman had indicated an interest in becoming a State trooper (a woman police offier was "unheard of") and that even in recent years it is rare for a woman to be so motivated, the Court cannot lay at the feet of the Virginia State Police all the blame for the lack of female troopers on its force. However, after the Congress acted in 1973 to bar sex discrimination to recipients of LEAA funds the State Police had a legal duty to remove barriers imposed by it which had the effect of discriminating against female applicants.

The defendant had a duty to review its employment practices when it became subject to the Act, and either to modify those practices which resulted in extreme adverse impact to a protected group, such as women, or to seek to justify by empirical evidence the necessity for such standards. The defendant did not remove the height

and weight barrier until July 1976 and in this suit it made no effort to justify the retention of the requirement on empirical grounds. The only evidence of the job-relatedness of the height and weight requirement found in the record is the opinions of five members of the Virginia State Police that height and weight are useful in police work. This evidence was not offered to prove job-relatedness but to prove a good faith belief of job-relatedness. There is no evidence that justified a 5'9" requirement or a 159 pound weight requirement. Such evidence would be necessary to establish the job-relatedness of the standard used by the Virginia State Police.[6] In fact, the only empirical evidence in the record as to the validity of the height and weight requirement is Dr. Edgerton's finding that neither height nor weight of the officers correlated substantially with any criterion of job performance in his 1973 validity study. Defendant's Exhibit 12, p. 96.

It was not, of course, the implementation of the height and weight requirement in the pre-Act period when no women were considered, nor even its continued use after the Act when it arguably could be considered a bona fide job-related facially neutral requirement that was illegal.[7] But the persistence of the practice well after the enactment without evidence of its enhancement of job performance can only mean that the State Police intended to keep the number of women on its force low. Thus, the Court concludes that from and after the effective date of the Act the defendant purposefully discriminated against women in employment as State troopers.

The foregoing discussion also affirms plaintiff's contention that the height and weight requirement is an illegal employment practice under the disparate impact theory of Griggs.

IV

The plaintiff alleges that the Virginia State Police discriminates on the basis of race in hiring for civilian positions. Plaintiff's case is based almost entirely upon the statistical evidence on the numbers of blacks hired by the defendant compared with the numbers of blacks that would have been hired by the defendant if the defendant had hired blacks in proportion to their representation in the civilian labor force in Virginia.

Plaintiff seeks to prove its case by a statistical analysis involving the use of the standard deviation of a population sample. The argument is that if there were no discrimination practiced by the Virginia State Police the proportion of blacks employed in civilian positions by the Virginia State Police would be equal to the proportion of blacks in the civilian labor force. A slight deviation would not be strong evidence of discrimination. A major deviation would be significant. Therefore, the plaintiff has used the standard deviation analysis to show that the numbers of blacks hired by the Virginia State Police in civilian positions is significantly smaller than the number of blacks that would have been hired if blacks had been hired in the same proportion as their representation in the civilian labor force. This analysis has resulted in Table I:

TABLE I

Statistical Analysis of Black Employees in Civilian Positions with the Virginia State Police, 1973-1976.
(Source: Plaintiff's Exhibit 23D)

	Total Employed	Blacks Actually Employed	Expected Employed	Difference Between Actual & Expected
12/31/73	396	21	68	47
12/31/74	412	18	70	52
12/31/75	438	22	75	43
12/31/76	451	28	77	49

	Standard Deviation	Number of Standard Deviations Difference
12/31/73	7.51	6.3
12/31/74	7.66	6.8
12/31/75	7.90	5.4
12/31/76	8.01	6.1

Table I is derived by first multiplying the total number of persons employed in civilian positions for each of the years 1973 through 1976 by the number .172 which is the proportion of blacks in the civilian labor force in Virginia as of the 1970 census. This calculation results in the "expected employed" statistic - the number of blacks who would have been in the employ of the Virginia State Police had the Virginia State Police employed blacks in proportion to their membership in the civilian labor force. The plaintiff then subtracts the number of blacks actually employed by the Virginia State Police from this figure for expected employees and divides the figure thus obtained by the standard deviation for the population. The number thus obtained is the number of standard deviations between the number of blacks who would have been employed had the hiring of the Virginia State Police been random, and the number of blacks actually hired. If that number were no more than two or three, then the inference that hiring in the Virginia State Police was unbiased

with respect to race would be supported. When, as here, the number is five or more, the inference that hiring in the Virginia State Police for civilian positions is unbiased with respect to race is not supported.

This analysis necessarily makes several assumptions. First, it is assumed that the civilian labor force for the entire Commonwealth of Virginia is the labor pool from which the Virginia State Police draws its civilian employees. The evidence shows, however, that the bulk, of its civilian employees are located at the State Police Headquarters in Richmond and thus are drawn from the Richmond area. Accordingly, the civilian labor force statistics for the State as a whole are not applicable. Plaintiff's analysis does not take into account the present effects of pre-Act hiring. The analysis further fails to take into account other population characteristics which are not shown to be randomly distributed with regard to race. One such non-random population characteristic may be the distribution of various skills required by the civilian positions offered by the Virginia State Police. Another such characteristic, shown by the evidence to be concentrated among blacks, is an antipathy toward law enforcement as a career. Tr. 9-104. The entire history of black deprivation which has made affirmative action necessary refutes an assumption of even or random distribution of job skills and motivations.

As the Supreme Court has said, "[w]hen special qualifications are required to fill particular jobs, comparison to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Hazelwood, 433 U.S. at 308, n. 13. A review of Plaintiff's Exhibit 22,

however, shows that the civilian employees of the Virginia State Police include persons in such positions as accountants, building construction inspectors, clerk stenographers, clerk typists, computer programmers, computer systems analysts, highway equipment mechanics, radio engineers, radio technicians, photographers, and other skilled positions.

In the absence of any evidence from plaintiff as to the percentage of blacks holding the indicated skills, or, alternatively, evidence that the skills are commonly held and easily learned, cf. Hazelwood, 433 U.S. at 308, n. 13, the Court simply has no basis for finding that blacks are so underrepresented in the skilled civilian positions that racial discrimination may be inferred.

The Court has attempted to separate out from the civilian job titles found in Plaintiff's Exhibit No. 22B positions that presumably many persons can fill or which can be filled with minimal training. The distribution of black and white employees in these positions is set out in Table II-A. The remainder of the positions are set out in Table II-B.[8]

Table II-A

Civilian Employees in Unskilled Positions
as of 31 December 1976
(Source: Plaintiff's Exhibit 22B)

	White	Black
Clerk D	6	-
Clerk C	19	1
Clerk B.	47	4
Clerk-Mess. B	2	-
Comp. Oper. A	2	1
Comp. Oper. B	2	-
Cook A	-	2
Corr. Off.	-	1
Cust. Worker	5	2
Fing. Tech. A	3	2
Fing. Tech. B	5	-
Food Serv. Aid A	1	5
Off. Dup. Mac. Op. A	3	-
Painter	1	-
PhotoCpy. Eqp. Oper. B	1	-
Rec. Info. Dispatcher	1	-
Staff Photo.	2	-
Stat. A	1	1
Storekeeper Asst.	1	-
TOTAL (Percent)	102 (84.3)	19 (15.7)

TABLE II-B

Civilian Employes in Skilled Positions
as of 31 December 1976
(Source: Plaintiff's Exhibit 22B)

	White	Black
Acct. B	1	-
Acct. A	1	-
ADO Mgr. A	1	-
ADP PC Supv.	1	-
ADP P. Tech A.	1	-
Bldg. Const. Insp.	1	-
Bldg. & Gds. Supv. A	1	-
Cent. Crim. Rec. Asst. Dir.	1	-
Cent. Crim. Rec. Exc. Dir.	1	-
Cent. Crim. Rec. Supv.	1	-
Clerk-Steno D	15	-
Clerk-Steno C.	53	1
Clerk-Steno B	10	-
Clerk-Typist C	22	-
Clerk-Typist B	48	-
Comp. Oper. Supv.	1	-
Comp. Prog. B	2	-
Comp. Prog. A	3	2
Comp. Syst. An. A	2	-
Comp. Syst. Dev. Supv.	1	-
Conf. Sec.	1	-
Data Entry Op. A	20	1
Data Entry Supv.	1	-
Dict. Unit Supv. A	-	1
Hwy. Equip. Supv. A	1	-
Hwy. Equip. Rep. For. A	1	-
Hwy. Equip. Mech. A	5	-
Hwy. Equip. Mech. B	1	1
Hsk. Supv. A	-	1
Info. Dir. A	1	-
Police Dispatcher	84	-

(Continued on Page 25)

(Continued from Page 25)

TABLE II-B (Continued)

	White	Black
Pur. & Stores Supv. B	1	-
Radio Asst. Eng.	1	-
Radio Eng.	1	-
Radio Mech.	4	-
Radio Mech. LD Man.	1	-
Radio Tech. B	7	-
Radio Tech. A	19	1
Radio Tower Asst. Supv.	1	-
Radio Tower Supv.	1	-
Soft Wr. Syst. Prog. B	1	-
Staff Photo	2	-
Storekeeper Fore.	2	1
Storekeeper Supv. C	1	-
Storekeeper Supv. A	7	-
TOTAL (Percent)	331 (97.6%)	8 (2.4%)

These tables, the Court recognizes, have very little probative value. There is, for instance, no evidence in the record to support the Court's determination that the jobs found in Table I are those which require skills that many persons possess or may easily acquire. The Court's choice was based entirely on the name of the position as set forth in Exhibit 22B. Nevertheless, it is apparent that the proportion of blacks in those jobs which the Court speculates are those in which comparison with general population statistics is appropriate, is very close to the proportion of blacks in the State civilian labor force according to census data.[9] These figures do not suffice to prove that the Virginia State Police have not discriminated against blacks in hiring for civilian positions. However, it is not the burden of the

Virginia State Police to prove that they have not discriminated. It remains the burden of the United States to prove that they have discriminated. Roman v. ESB, Inc., 550 F.2d 1343, 1350 (4th Cir. 1976).

The plaintiff introduced the testimony of only one witness to show that there had been racial discrimination in hiring for civilian positions in the Virginia State Police. Miss Evelyn C. Faison testified that she had taken the civil service test for a clerical position with the Virginia State Police. Her application, Defendant's Exhibit 148, shows that she did not list the fact that she had taken and passed a State civil service examination for a clerical position. The work experience listed in her application shows work as a presser in a cleaning establishment, as a utility aid in a paper company, as an elevator operator at the Medical College of Virginia and in the cleaning department of a cleaning establishment. On the basis of her application Miss Faison was offered a food service job at the Virginia State Police Headquarters. The plaintiff argues that this incident shows the method by which blacks were channeled into lower paying clerical and food service positions in the Virginia State Police. In fact, it shows nothing of the kind. The job Miss Faison was offered was commensurate with her abilities as they appeared from her application. Thus, the testimony of Miss Faison is of no value in showing discrimination by the defendant against blacks in hiring for civilian positions.

Plaintiff also argues that the concentration of black civilian employees in food service and custodial positions shows racial discrimination on the part of the Virginia State Police. The evidence shows that of 15 civilian employes in the jobs of cook, food service aid, and custodial

worker, six are white and nine are black. However there is no evidence in the record to show whether this disproportional assignment of black workers to custodial and food service positions is the result of post-Act hiring, or if this pattern is merely a holdover from the time before the effective date of the Act. In the latter case, no liability could be found on the basis of these statistics. Hazelwood, 433 U.S. at 309. The evidence that the Court does have, however, shows that the proportion of blacks in these positions has declined from 77% in 1974 to 60% in 1976. (See Table III). Finally, there is no evidence in the record that food service or custodial jobs are lower paid or less desirable jobs in the Virginia State Police than such jobs as clerks, clerk typists or office duplicating machine operators.

TABLE III

Civilian Employees in Food Service and Custodial Positions by Race as of 31 December 1974 and as of 31 December 1976
(Source: Plaintiff's Exhibit 22B)

	1974		1976	
	White	Black	White	Black
Cook A	-	2	-	2
Cust. Worker	3	3	5	2
Food Svc. Aid A	-	5	1	5
TOTAL	3	10	6	9
Percent	23.1%	76.9%	40.0%	60.0%

The Court treats separately the civilian position of police dispatcher. Applicants for the job of police dispatcher with the Virginia State Police were required to take the same written examination taken by applicants for trooper positions. This written examination is discussed

in Part IV of this memorandum. The analysis of adverse impact found there applies equally to the test when used to test applicants for dispatcher position. Thus, the test, as will be seen in Part IV, is shown to have an adverse impact upon blacks, and may be used as a selection device only if it has also been shown to be a valid predictor of job performance.

The defendant has not even attempted to show that the written test is in any way related to any criterion of job performance in the job of police dispatcher. Unlike the job of trooper, successful completion of a training program is not a requirement for the job of dispatcher. The evidence shows, it is true, that some dispatchers are sent to the State Police training school, if space permits, to familiarize them more fully with the tasks of the troopers they support. However, it is clear from the evidence that the training school is not a requirement of the job of dispatcher. Thus, the Court finds that it was a violation of § 3766(c) for the Virginia State Police to use the written test as a selection device for applicant for the dispatcher position.

Plaintiff's Exhibit 15 shows that only five black applicants for dispatcher positions failed the State Police written test from 10 May 1973 to 31 December 1975. The record does not show how many of these were failed prior to the effective date of the Act, 1 July 1973. It is clear in any event that the unlawful employment practice found by the Court had a very small impact. Nevertheless, relief must be fashioned to make whole those persons who are the victims of that unlawful employment practice.

V

The court will now consider the main thrust of plaintiff's case, that the Virginia State Police discriminated against blacks in hiring for trooper positions. Plaintiff seeks to prove its case through five basic modes of proof. First, the plaintiff has offered statistical evidence on the hiring of blacks by the Virginia State Police compared with the statistics on the proportion of blacks in what is alleged to be the relevant labor market. Second, the plaintiff contends that the use of a written test from the effective date of the Act to December 1975 had an adverse impact upon black applicants and that the test has not been shown to be validated as as job-related. Third, the plaintiff contends that the background investigation of trooper applicants was conducted in such a way as to discriminate against black applicants. Fourth, the plaintiff has presented the testimony of several black applicants and conditionally appointed troopers who claim to have been discriminated against in the employment process by the Virginia State Police. Fifth, the plaintiff contends that the minority recruiting program of the Virginia State Police is inadequate, and that the failure of the Virginia State Police to run an adequate minority recruiting program is evidence of discrimination.

A.

The race of Virginia State Police sworn personnel on the last day of December 1973 to the last day of December 1976 is shown in Table IV.

TABLE IV
Virginia State Troopers by Race
1973-1976

Date	Total Employed	White (%)	Black (%)
31 December 1973	1055	1047 (99.2%)	8 (0.8%)
31 December 1974	1096	1087 (99.2%)	9 (0.8%)
31 December 1975	1104	1093 (99.2%)	11 (1.0%)
31 December 1976	1132	1101 (97.3%)	31 (2.7%)

These figures, of course, reflect the results of hiring practices of the Virginia State Police over a period of decades. This Court must necessarily concern itself with the hiring record of the Virginia State Police since the July 1973 effective date of the Act.

The statistics on hiring in the Virginia State Police since 1973 are set out in Table V.

TABLE V

Troopers Hired by the Virginia State Police by Race
1973-1977

Year	Total Hired	White (%)	Black (%)
	91	85 (93.4%)	6 (6.6%)
1973*	96	93 (96.9%)	3 (3.1%)
1974	64	62 (96.9%)	2 (3.1%)
1975	86	63 (73.3%)	23 (26.7%)
1976	63	52 (82.5%)	11 (17.5%)
1977 (As of 12 August 1977)			
TOTAL	400	355 (88.75%)	45 (17.5%)

* Hiring figures for 1973 reflect hiring for the entire year, not merely the six months after the effectve date of the Act.

The Supreme Court's opinion in Hazelwood indicates that there are two comparisons that may be made using the data found in Table V. One is to compare the proportion of blacks hired by the Virginia State Police with the proportion of blacks in the relevant labor market. The other comparison that may be made is to compare the proportion of blacks hired with the proportion of blacks among those who sought employment with the Virginia State Police.

a.

Before the first comparison can be drawn, however, it is necessary to determine what constitutes the relevant labor market for the position of trooper in the Virginia State Police. Plaintiff contends that the best statistics available for a relevant labor market are the figures from the 1970 census for the civilian labor force aged 21 to 29 in Virginia. Defendant argues, however, that these undifferentiated work force statistics include many persons who could not meet the minimum requirements for the job of State trooper. The defendant offers statistics which purport to include those individuals who at the time of the 1970 census were 21 through 29 years of age, had completed twelve years of education or had a General Education Development (GED) certificate, were not disabled for six months or more, were not in jail or in a long term hospital, and were in the "labor force" as defined by the Bureau of Census. The plaintiff's method of calculating the relevant labor market results in a relevant labor market that is 16.3% black. The defendant's method gives a relevant labor market that is 10.67% black.

The method chosen by the defendant appears to be by far the more relevant. However, the

plaintiff raises two objections to defendant's approach. First, the plaintiff argues that the adjustments made by the defendant are made not in an attempt to more closely define the proper labor market but in an attempt to reduce the proportion of blacks in the relevant labor market. Second, the plaintiff argues that the defendant's figures are not up-to-date with respect to the proportion of blacks in the relevant age group and with respect to the proportion of blacks who have achieved the required educational level.

The Court believes that the plaintiff's first objection is not well taken. Despite the view of plaintiff's industrial physchologist that aggregate data should be used even where more precise data is available because there is no agreement among experts as to what adjustments are appropriate, the Supreme Court in Hazelwood made it clear that the district court should define the relevant labor market with as much precision as possible. 433 U.S. at 312. The entire purpose of a comparison between hiring statistics and labor force statistics is to show that the hiring of the defendant is or is not random with respect to race. Unless other non-random factors are first accounted for, this purpose will necessarily be defeated, and the entire analysis will be utterly lacking in probative value. It would be simply a cover for statistically justifying a pre-conceived conclusion.

The plaintiff's second objection is far more valid. Plaintiff presented the testimony of Dr. Larry Suter, Chief of the Education Statistics Branch of the Population Branch of the Bureau of the Census, to show that certain population trends since 1970 have resulted in an increase in the proportion of blacks in the defendant's defined labor force. Dr. Suter testified that the

proportion of blacks in the 21-29 year old age group has increased in Virginia since the latest decennial census. He also testified that the proportion of blacks meeting the minimum educational standards of the Virginia State Police has increased in Virginia since 1970. Dr. Suter suggested increasing the proportion of blacks in the eligible labor force as defined by the defendants from 10.67% to either 12.47% or 15.47% in 1977. Tr. p. 11-13.

Dr. Suter testified that his analysis of the increase in black educational attainment since 1970 would indicate that the eligible labor force for the Virginia State Police as defined in Defendant's Exhibit 119 should be increased by perhaps 1.8% or even by as much as 4.8% because of the increase in the proportion of blacks in the 20-29 age group and the increase in the proportion of blacks who are high school graduates. The 1.8% figure comes from Dr. Suter's analysis of the current population survey for the nation as a whole. Tr. p. 11-11. The 4.8% figure is derived from the Virginia segment of the national current population survey, but Dr. Suter was reluctant to put great confidence in the Virginia figure because the current population survey was based on an intended national sample, not a sample reflective of the population of Virginia. The Virginia sample is so small that the standard error of the sample is relatively high. In addition, Dr. Suter's analysis is limited to persons not in the armed forces, a fertile recruiting ground for the State Police. Also, Dr. Suter's competence in the field of determining relevant labor markets was notconceded by defendant nor, indeed, was it claimed by Dr. Suter. Tr. 11-5. Finally, Dr. Suter's testimony was not claimed to be and was not presented by the plaintiff in an effort to prove the proportion of blacks in the eligible labor force. It was instead

presented on rebuttal to show that the figures in Defendant's Exhibit 119 should not be accepted by the Court as an accurate portrayal of the eligible labor force because the figures are now eight years old and change has taken place. Dr. Suter's testimony clearly supports this objection. The plaintiff argues that defendant's calculations based on the 1970 census are incorrect because they are out-of-date. Unfortunately for the Court, the same argument applies with equal force to plaintiff's statistics.

The purpose of establishing the relevant labor market of trooper applicants to the Virginia State Police is to raise an inference, by comparison of that figure with the number of blacks actually hired, that the Virginia State Police discriminated against blacks in hiring. Thus, the burden of proving the relevant labor market rests squarely upon the plaintiff in this case. The foregoing discussion makes it clear that the plaintiff has not carried its burden. Neither party has offered the testimony of an expert in demography or of a witness qualified by his experience or training to testify as to the racial breakdown of the relevant labor market for a trooper in the Virginia State Police for any period covered by this law suit. Plaintiff protests that other courts in similar cases have used the aggregate, undifferentiated census figures it offered in this case. If this be true it still is not justification in this Court's view for imposing liability upon a defendant on the basis of unreliable or missing evidence. This case has been pending since December 1976. The United States does not lack the resources to develop the proof necessary to show the relevant labor market. The reliance upon unanalyzed data copied from the 1970 census, even coupled with Dr. Suter's projections, cannot replace reliable proof in an important case such as this.

In Hazelwood, the district court failed to make a finding of fact on the relevant labor market for teachers in the St. Louis area. The court ruled no discrimination upon a finding that the proportion of black teachers was roughly equal to the proportion of black pupils in the school district. The Supreme Court disapproved of this comparison, but also disapproved of the action of the court of appeals in accepting the plaintiff's argument that the relevant labor market should be determined by including teachers from the entire St. Louis metropolitan area. The Supreme Court remanded the case to the district court for a precise finding on the actual relevant labor market of qualified teachers in the area from which applicants were drawn. In the present case, unlike Hazelwood, the plaintiff has failed to introduce evidence sufficient for a finding of the relevant labor market. Under these circumstances, no comparisons can validly be drawn and the standard deviation data offered by plaintiff in reliance upon Castaneda v. Partida, 430 U.S. 482, 496-97, n. 17 (1977), is meaningless.

b.

Even if the relevant labor market were, as plaintiff contends, 16.3% black, the Castaneda analysis would not support a finding of racial discrimination. First, the Court considers it inappropriate to apply the Castaneda analysis to the statistics for the total sworn work force of the Virginia State Police. Because only such discrimination as took place after the effective date of the Act may be considered in making a finding of liability in this case, only the hiring behavior of the defendant since 1 July 1973 is relevant to the question of liability. Thus, the proper statistics to which the Castaneda analysis may be applied are the figures for troopers hired

from 1973 to 1977. More precisely the proper statistics to use in this analysis would be the statistics showing the racial makeup of persons offered employment with the Virginia State Police in sworn positions after 1 July 1973. The Virginia State Police has no power to conscript persons into its work force. If 16.3% of those persons offered employment in sworn positions by the Virginia State Police were black, the plaintiff's argument would fail even if no blacks accepted the offer from the State Police (assuming nothing more were shown). Thus, the fact that the plaintiff uses only hiring statistics necessarily requires the Court to assume, in order to find liability on the basis of those statistics, that the applicants from both races accepted employment when offered at the same rate. Nothing in the record will support this assumption, and this fact makes the Court uneasy about using plaintiff's Castaneda analysis to impose liability upon the defendant. In any case, the plaintiff's Castaneda analysis is set out in Table VI.

TABLE VI

Statistical Analysis of Black Employees in Trooper Positions with the Virginia State Police 1973-77
(Source: Plaintiff's Exhibit 21B)

	Total Employed	Blacks Actually Hired	Blacks Expected Hired	Difference Between Actual & Expected
1973	91	6	14.8	-8.8
1974	96	3	15.6	-12.6
1975	64	2	10.4	-8.4
1976	86	23	14.0	+9.0
1977	63	11	10.3	+0.7

(Continued on Page 38)

(Continued from Page 37)

TABLE VI

	Standard Deviation	Number of Standard Deviations Difference
1973	3.52	-2.5
1974	3.62	-3.5
1975	2.95	-2.8
1976	3.42	+2.6
1977	2.93	+0.2

Table VI shows that the difference between the number of black troopers actually hired and the number of black troopers that would have been hired if the defendant had hired blacks in proportion to their numbers in the civilian labor force was significant in 1973, 1974 and 1975. In each case, the difference between the number actually hired and the number expected to be hired was more than two standard dev ations from the mean. However, the numbers involved are very small. For example, if in 1973 the Virginia State Police had hired two more blacks than they actually hired, 8 instead of 6, the difference between the actual number hired and the expected hired would have been only 6.8, less than 2 standard deviations difference. Furthermore, in 1976 the defendant hired many more blacks than the plaintiff's formula would have expected it to hire. In 1977, the defendant hired almost exactly the number that plaintiff's formula expected it to hire.

The Court does not believe that is a coincidence that defendant's statistics on hiring of blacks should change so dramatically at the same

time that the defendant abolished its written test, that is, the end of 1975. Thus, the Court believes that the low numbers of blacks hired prior to 1976, far from being the telltale sign of intentional discrimination, is in fact, the unintentional (and apparently undesired) result of defendant's use of a written test as a selection device.

It should be noted that if the defendant's 10.67% figure be used then the hiring practices during the overall post-Act period are proportionate to random hiring in the designated population and no inference of discrimination arises. As will be shown hereafter, the Virginia State Police force is not composed of persons randomly hired. The hiring of State troopers is a highly selective process.[11]

c.

The other comparison which may be made is a comparison between the hiring of blacks and the applicant flow of blacks. If the proportion of blacks offered employment by the defendant is significantly smaller than the proportion of blacks among applicants, then the inference that the defendant is discriminating against blacks with respect to hiring for trooper positions is supported. If, on the other hand, the proportions are roughly equal, the position of the plaintiff that the defendant discriminates against blacks in hiring is not supported.

In making this analysis, the Court is faced immediately with two serious problems in the evidence presented by the plaintiff. First, the applicant statistics introduced by the plaintiff in Plaintiff's Exhibit 34 are, for the years 1974, 1975, and 1976, not broken down between applications received for civilian positions and

applications received for civilian positions and applications received for trooper positions. Tr. 2-21-AM. The second problem is that in any given year the persons listed in Plaintiff's Exhibit 34B are not necessarily the same persons who applied during that particular year, but may include persons who applied during an earlier year. Thus, year-by-year comparisons are impossible.

Taken as a whole, however, the applicant-flow data available shows that from 1973 through 1976 10.8% of all applicants for both civilian and sworn positions were black. Plaintiff's Exhibit 34A. Table VI shows that over the same period 34 of 337 or 10.1% of all troopers hired were black. Thus, the analysis of such applicant-flow data as is available to the Court fails to reveal any evidence of a pattern or practice of discrimination.

The Court notes that in 1973, 1974 and 1975 the proportion of blacks hired as troopers was much lower than the proportion of blacks hired in 1976 and 1977. Although, as has been shown year-by-year comparisons of applicant flow data and hiring data are difficult or impossible to draw and the proper comparison in any case is between the number of applicants and the number of persons offered employment with the Virginia State Police, the Court nevertheless recognizes that the relatively low number of blacks hired may be a telltale sign of discrimination in the early years immediately following the effective date of the Act.

The plaintiff has attempted to attribute the increased hiring of blacks in 1976 and 1977 to a combination of the pressure put on the defendant by the Justice Department in the negotiations that preceeded the filing of this lawsuit and the desire of Dr. Phillip Ash for a sample of at least 20 black troopers for his differential validity study.

Defendant did not display evidence of bending to threats or pressure from the Justice Department. It was because defendant refused to bend that the suit was instituted. The Court believes that the abolition in 1976 of the written test used by the Virginia State Police was the factor which led to the sharp increase in hiring of blacks. This test had a substantial adverse impact on blacks and its abolition coincided with a sharp increase in the hiring of blacks. Further, by the middle of the 1970's the minority recruiting program commenced in 1973 had begun to have favorable effects.

B.

From the effective date of the Act until December 1975 the Virginia State Police administered a written test to all applicants for trooper positions consisting of a battery of three tests: the Army Alpha Test, the Otis Test of Intelligence, and the O'Rouke Test of Mechanical Aptitude. Plaintiff's Exhibit 11. The defendant does not dispute plaintiff's contention that this test has a severe adverse impact upon blacks. (See Table VII). Thus, under Griggs, the burden of proof passed to the defendant to show that the test was valid.

TABLE VII

Results of Written Aptitude Tests for Trooper and Dispatcher Positions by Race, 1973-1975
(Source: Plaintiff's Exhibit 15)

Whites		Total Taking Exam	Total Passing	Pass Rate
1973	Trooper	194	147	75.8%
	Dispatcher	31	24	77.4%
1974	Trooper	335	247	73.7%
	Dispatcher	53	34	64.2%
1975	Trooper	126	101	80.2%
	Dispatcher	62	46	74.2%
TOTAL	Trooper	655	495	75.6%
	Dispatcher	146	104	71.2%
	TOTAL:	801	599	74.8%

Blacks		Total Taking Exam	Total Passing	Pass Rate
1973	Trooper	37	12	32.4%
	Dispatcher	2	1	50.0%
1974	Trooper	87	28	32.2%
	Dispatcher	4	1	25.0%
1975	Trooper	21	4	19.0%
	Dispatcher	2	1	50.0%
TOTAL	Trooper	145	44	30.3%
	Dispatcher	8	3	37.5%
	TOTAL:	153	47	30.7%

The pass rate for black applicants is equal to 41.0% of the pass rate for whites.

It is clear that the test has not been shown to be a valid predictor of on-the-job performance. The validity study conducted by Dr. Harold A. Edgerton in 1973 did not prove any substantial correlation between performance on the written test and any measure of job performance. The defendant argues that the test is nevertheless valid because performance on the test is significantly related to training school performance. Dr. Edgerton's study showed that the test score had a significant correlation with two measures of school achievement, school grades and class standing. Of course, one's class standing is a closely related function of his school grades, so these two measures may be considered, in reality, one. Nevertheless, the testimony shows that each of these correlations was both statistically and practically significant. In other words, one who did well on the entrance test could be expected to do well in school.[12]

In Washington v. Davis, 426 U.S. 229, 249-52 (1976) the Supreme Court considered the question of whether validation of a selection test against training school performance was sufficient under the standard in Griggs and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The Court held squarely that a written test may be validated against training school performance alone even in the absence of evidence that performance in the training program is related to the actual performance of the job. In the instant case, the evidence shows that the successful completion of the training program is a requirement for the job of trooper, that the training school entails approximately 1,000 hours of study over a period of more than twenty weeks, that the cost of training a new trooper is somewhere between $19,000 and

$20,000, and that the attrition rate in the training school has increased sharply since the written test was dropped in 1975. Tr. 9-142-146. Under these circumstances, the Court believes that it is sufficient for the defendant to show that the written test was a valid predictor of training school performance in order to sustain its burden of proof under Griggs as interpreted by Washington v. Davis.

Plaintiff presents the testimony of Dr. James J. Kirkpatrick in an attempt to show that the validity study relied upon by the defendant was not conducted in accordance with federal and professional standards for such studies. The substance of Dr. Kirkpatrick's objection to the study is that it did not test for differential validity. It is obvious that differential validity test was technically infeasible at the time Dr. Edgerton conducted his study in 1973. There simply were not enough blacks on the force at that time to conduct such a study. Dr. Kirkpatrick, on cross-examination, admitted this but nevertheless insisted that the study was flawed. Such insistence was of a piece with Dr. Kirkpatrick's approach to the issues in this lawsuit.[13]

The defendant presented the testimony of Dr. Phillip Ash, an industrial psychologist who is presently engaged in designing a new test battery for the Virginia State Police. Dr. Ash conducted a re-analysis of the data gathered by Dr. Edgerton in 1973. Dr. Ash testified on the basis of his analysis of Dr. Edgerton's data that the written test was a valid predictor of training school performance. Tr. 9-202. Dr. Ash also testified that Dr. Edgerton "could have written a much more forceful summary of positive results than he did." Tr. 10-60.

The Court found Dr. Ash's testimony wholly satisfactory. His impartiality and professional attitude was apparent from his demeanor and responses. The Court accepts Dr. Ash's views on the validity of the written test as correct, and rejects the views to the contrary which Dr. Kirkpatrick professed to hold.

Although such regulations as the EEOC Guidelines on Employee Selection Procedures and the Department of Justice Guidelines are entitled to great weight, the validity of a test does not rise or fall solely on the basis of whether the test and the validity study concerning that test meet the Guidelines. Validity is determined by the capapcity of a given test to predict job performance. This is a question of fact, and in making this determination the trier of fact must depend heavily upon the opinions of experts in the field. In this case, the Court has the benefit of the views of three experts, Drs. Edgerton, Ash, and Kirkpatrick. Two of these three, after reviewing the criteria, the Guidelines and the statistical evidence, say that the written test used by the Virginia State Police is a valid predictor of training school performance. The third, Dr. Kirkpatrick, says that the test is not valid. The view of Drs. Edgerton and Ash is supported by the statistical proof, and buttressed by Dr. Ash's experience, competence and objectivity. The Court finds on the basis of this evidence that the written test used by the Virginia State Police was, in fact, a valid predictor of training school performance. Thus, under the rule in Washington v. Davis, its use by the Virginia State Police was not an unlawful or discriminatory employment practice.

Plaintiff contends that even if the test is valid the cut-off score was placed too high by the Virginia State Police. In order to be eligible for

employment, an applicant had to achieve a score of 75 on each of the three written tests given by the Virginia State Police. The plaintiff argues that this cut-off score could have been placed much lower and still have been suitable for the defendant's purpose to select those applicants who were capable of passing the training school program.

Defendant apparently agrees that there are some applicants who could pass the training school program even though they received a score on the written test of less than 75. Defendant argues, however, that a lower cut-off score would result in a larger number of "false positives" - persons who pass the written test but are incapable of passing the training school. Tr. 10-80.

The Court believes that the investment necessary to train a State trooper is great enough to justify a cut-off score which would minimize the number of "false positives" and thus save the people of the Commonwealth a substantial sum of money. The Court further believes that such a decision is within the sound discretion of the Virginia State Police. The Department of Justice may believe that a lower cut-off score would have been more appropriate and it may use lower scores in areas it administers, but that is not sufficient to impose liability upon the defendant in this law suit.

The Court recognizes that the testimony showed that when the entrance test was in use very few persons failed the training school because of low grades, that trainees who received low passing grades in the training school may perform well as troopers, and that training school grades are of little utility after a trooper has completed the training school. These things are all factors

which the Superintendent of the Virginia State Police should have taken into account in deciding the proper cut-off score for the written test. They do not, however, prove that the written test was used by the State Police as a subterfuge for the purpose of excluding blacks.

In summary the Court finds that the defendant has carried its burden to show that the use of the written test was justified by a valid governmental purpose, in that the written test was a valid predictor of training school performance. The plaintiff, on the other hand, has not proven that the use of the written test, although valid, was in fact a subterfuge for racial discrimination.

C.

The plaintiff challenges the defendant's use of background investigations as part of its selection process for new troopers. Plaintiff's challenge has two parts: First, the plaintiff argues that the background investigation shows an adverse impact on black applicants. Second, the plaintiff claims that in certain particulars the background investigation was applied in a disparate manner so as to discriminate against blacks.

a.

Plaintiff's disparate impact analysis rests upon two objections. First, the plaintiff contends that the background investigation had the result of weeding out a disproportionate number of black applicants, and second, the result was achieved through the purposeful use of credit ratings, cohabitation, venereal disease, and illegitimacy as factors in the background selection process.

The plaintiff's first attack on the background investigation is based on highly questionable statistics. The plaintiff has chosen to provide the Court with full statistics for black applicants, but has not chosen to provide the Court with the statistics for white applicants, without which no meaningful comparison - indeed, no comparison at all - is possible. The Court was able, with some difficulty, to extract from Mr. Stanley Lechner, the witness for the plaintiff's exhibits, a "conservative" estimate of the white selection rate based on the background investigation. The result of the Court's inquiry, sketchy though they are, are recorded in Table VIII.

TABLE VIII

Results of Background Investigation on Trooper Applicants who passed written test
May 1973 - December 1975

	White	Black
Total Passing Exam:	495	44
Total Investigated:	406*	33
Number Offered Employment:	186*	10
Number Hired:	176	8
% of those investigated either hired or offered employment:	45.8	30.3

Black rate as a % of White rate - 66%

* Estimated by Mr. Stanley Lechner. Transcript, pp. 2-83-PM-2-86-PM.

Table VIII is questionable for two reasons. First, the estimates made by Mr. Lechner were made on the basis of his examination of a sample of 247 of these applications. His testimony shows that his sample consisted of the set of applications from the year 1974. Tr. 2-91-PM. Although Mr. Lechner was satisfied with this sampling the device, the Court is not. In view of the other statistical changes there is no reason to believe that 1974 was a typical year, a fact which in the Court's eyes is far more significant than Mr. Lechner's observation that there is no reason to believe that there is any difference between what happened in different years.

Second, the sample of blacks involved in Table VIII is relatively small. If only two more blacks had been offered employment in this period, the selection rate for blacks would have been 80% of the selection rate for whites, and so this selection rate would not have been evidence of adverse impact under the Federal Agency Guidelines.

Further, the evidence shows that during the period represented by Table VIII the Virginia State Police was engaged in a substantial recruitment effort which had as its purpose increasing the number of black applicants for trooper positions. The Court does not believe that applicants whose applications are the result of defendant's recruiting efforts can properly be compared directly with applicants who submitted their application on their own volition. In addition, the period covered by Table VIII is only from May 1973 through 1975. The evidence shows that since 1975 the abolition of the written test has resulted in a sharp increase in the number of black applicants who have received a background investigation. Plaintiff's Exhibit 60. However, the plaintiff has not introduced evidence which

would permit the Court to make a comparison between the selection rate of blacks who were investigated since 1975 with the selection rate for white applicants investigated since 1975. The Court cannot find on the basis of this conjectural and incomplete evidence that the use of the background investigation as a selection device by the Virginia State Police has had an adverse impact upon black applicants.

The plaintiffs contend, however, that the use of certain information gathered in the background investigation has an adverse impact upon blacks. Plaintiff does not contend that the factors in question are inappropriate for inquiry. It argues only that the manner in which the information was used discriminated against blacks. Plaintiff examined the file of three by five cards prepared by the State Police personnel officer from 1974 to 1977 showing the notes of the personnel officer on points he considered of interest to be discussed with the superintendent prior to the superintendent's decision on an application. The plaintiff's argument is that since certain factors showed up more frequetnly on the background investigation of black trooper applicants than they did on the investigation of white trooper applicants, the use of those factors in the employment process by the defendant constituted an unlawful employment practice unless the defendant could come forward with proof that the factors were somehow predictive of job performance.

The Court sees no merit in the plaintiff's argument. First, the Court notes that the plaintiff apparently compared the cards of rejected black applicants with those of rejected white applicants. Thus, only those who failed to pass the background investigation are included in the plaintiff's sample. There is no showing that the

factors studied by the plaintiff are in fact the cause of a differential selection rate between blacks and whites. In fact, as noted above, no such differential selection rate has been proven in this case. The Court believes that it is perfectly reasonable for the defendant to take note as part of a comprehensive background investigation of prospective State troopers that any given applicant had a bad credit record, was living with another person out of wedlock, had veneral disease or any other disease, communicable or non-communicable, or had an illegitimate child or illegitimate children. The fact that consideration of these factors may weigh more heavily against black applicants than against white applicants (a fact not proven by the evidence in this case) does not by itself invalidate these questions as unlawful and discriminatory practices.[14]

The evidence shows that no specific weight is given to any one factor in a person's background when he is considered for a position in the Virginia State Police. The plaintiff argues that this, in itself, is evidence of discrimination -- that "standardless discretion" in the hands of the superintendent of the Virginia State Police is itself in violation of Title VII. If this came to be the law, it would mean that job selection even for sensitive and responsible positions such as State trooper must be performed exclusively by a computer or a dullard. Only "yes-no" data could be considered by those making employment decisions, and this data could easily be punched onto a card and inserted into a computer. The critical factor of human judgment, the informed jugment of one whose training and responsibility uniquely fits him for this decision-making role, would be irretrievably lost to the great detriment of all concerned.

b.

The plaintiff's most serious challenge to the defendant's background investigation procedure involves the claim that the background investigation as conducted in such a way as to discriminate against black applicants who were investigated. This is a disparate treatment claim, and, unlike the disparate impact claims discussed above, involves a showing of discriminatory intent. The method plaintiff has chosen to use in showing disparate treatment of black applicants subjected to background investigation is to compare the background investigation of white applicants who were offered positions in the Virginia State Police with those of black applicants who were rejected.

Plaintiff begins the comparison by showing that three white applicants who were hired had failed to list traffic convictions or certain previous jobs in their applications. The superintendent, Colonel Burgess, said that any such falsifications were adverse factors in a decision to hire an applicant. The white applicant in Plaintiff's Exhibit 1-8 did not list a conviction for speeding on his application. Page 6 of his background investigation shows that this conviction was a six year old speeding ticket from the Park Police at the Petersburg Battlefield Park which did not appear on the Division of Motor Vehicles report which the applicant had sought and obtained. This background investigation shows outstanding recommendations from all employers for honesty and an excellent credit record entirely without blemish and frequently reflecting payments in advance of the due date.

The white applicant in Plaintiff's Exhibit 1-4 did not list two schools and three jobs on his background investigation. The two schools were a

Base Extension of Troy State College, Montgomery, Alabama, where the applicant took some courses while he was in the Air Force, and Virginia Western Community College, which plaintiff attended in the Summer of 1971. The jobs were a summer job with the Virginia Department of Highways which the applicant held in high school (1966 or before) a job which the applicant took immediately after high school and held for two weeks in 1967, and a job that the applicant held for one month after leaving the Air Force. This applicant also had a credit record entirely without blemish, and was recommended by a sheriff and two Virginia State troopers. Further, this applicant had worked as an air policeman in the Air Force.

The white applicant in Plaintiff's Exhibit 1-1 lied to the investigator concerning working for his father-in-law to cover up for living with the daughter of his employer prior to their marriage. The investigation shows a good credit rating for this applicant and uniformly good recommendations.

The background investigation reports of the white applicants, as compared with the rejected black applicants, show considerable concern on the part of the Virginia State Police for the veracity of white applicants for trooper positions. It is clear that questions of veracity were fully explored and were either explained to the satisfaction of the investigator or were overcome by the positive factors in the applicant's background. The evidence does not justify an inference that veracity is more severely judged for black applicants.

The black applicant in Plaintiff's Exhibit 2-4 is one of those pointed out by plaintiff as having been rejected in part for bad credit. The background investigation reveals four credit

transactions all with a history of late payment, and one judgment rendered against the applicant. The background investigation also shows two convictions for defective equipment, one conviction for improper driving, and three convictions for speeding. This applicant also purchased luxury items before paying prior commitments, a factor which Colonel Burgess found significant. Tr. 7-68.

The applicant in Plaintiff's Exhibit 2-5 is another black applicant who had bad credit. This applicant also had a bad academic record, having failed English in the eleventh grade. His civilian employer did not know how this applicant could handle the paperwork for trooper. The applicant had three speeding convictions on his record. The applicant had earned $13,000 in the previous year and would have had to take a pay cut in order to be a trooper. Also, this applicant indicated in his interview that he disliked about his current job things which are also factors in a job as State trooper - long hours, no overtime pay, no union.

The black applicant in Plaintiff's Exhibit 2-11 was also rejected in part because of bad credit. This applicant did not list on his application one part-time job, which he had left without notice. His supervisor on this part-time job gave him a bad recommendation. The applicant had been convicted of reckless driving and of speeding. He claimed that one of his bad accounts was caused by a family member opening an account in his name while the applicant was in Viet Nam. But according to the investigator, the date of the applicant's service in Viet Nam and the opening of the account did not bear out this claim. The applicant also claimed that the speeding ticket was caused by his speeding home on the day his father died, but the relevant dates determined by the investigator failed to support this claim as well.

The applicant had an overdue loan at his credit union which was overlooked by plaintiff in its brief at footnote 12, page 28. Further, this applicant's wife thought that a trooper's job was too dangerous.

These three cases are to be compared on plaintiff's suggestion with the white applicant in Plaintiff's Exhibit 1-9. This applicant had a very poor academic record and failed to list several jobs on his application. The applicant had two speeding convictions. He explained his poor credit rating by relating that money he sent home while he was in the army was not used to pay bills. The investigator apparently believed this explanation but the applicant was denied employment. He then went to see Colonel Burgess personally and as a direct result of this personal interview he was hired. Colonel Burgess admitted that he gave this applicant the benefit of the doubt and that it might have been a mistake to have done so since the applicant did not stay with the Virginia State Police very long. Tr. 8-46-8.

The Court cannot find that the white applicant in Plaintiff's Exhibit 1-9 had as bad a record, apart from his bad credit rating, as the black applicants with whom he is asked to be compared. The Court notes that with respect to the background investigation, including adverse recommendations, the applicants were all treated exactly the same up to the point at which the applicant in Plaintiff's Exhibit 1-9 on his own inititative obtained a personal interview with Colonel Burgess. There is no evidence that any applicant was ever denied an interview with Colonel Burgess on account of race. Indeed, a black applicant who testified at trial, Charles White, testified that he had been accorded an interview with Colonel Burgess. Tr. 1-152.

Plaintiff asks that the black applicant in Plaintiff's Exhibit 2-3 be contrasted with the white applicant in Plaintiff's Exhibit 1-10. Colonel Burgess testified that the fact that the black applicant in Plaintiff's Exhibit 2-3 had a bad temper was a factor in his rejection of that applicant. The background investigation revealed that this applicant left a job in 1968 without notice. It revealed that the applicant was divorced and his former wife said that he didn't adequately support their child. The applicant's reference at the Norfolk Naval Shipyard gave the applicant a bad recommendation. On the other hand, the applicant's credit rating was good. He had one speeding conviction. The investigator reported that the applicant appeared tense at his interview and did not appear to really want the State Police job. The investigation revealed that the applicant said that he paid food and clothing for his child and he took the child as a dependent on his federal income tax. The plaintiff says that there is no mention or indication of bad temper except the investigator's undocumented conclusion. The evidence of the temper was found by the investigator in the involvement of the applicant in a fight during a crap game and in his becoming upset on his job at the Newport News ShipBuilding and DryDock Company.

The white applicant in Plaintiff's Exhibit 1-10 also was reported to have a temper. This applicant had quit a job at Uniroyal without proper notice but was still recommended by them because although he quit without a full two week notice, he did give sufficient notice for their purposes. Three persons interviewed had the following to say about the applicant: "Shows a little temper but controls it;" "Has a little temper but only exhibits it at ballgames, never got into any trouble over it." This applicant was recommended

by a Virginia State Trooper, and had a credit record entirely without blemish. The applicant had some traffic violations on his record, but said that he had changed his driving habits considerably an this was apparenty accepted by the investigator. The file reveals a letter of recommendation from a trooper brother-in-law of the applicant. The Court does not believe that these two applicants are equally worthy of hire. Accordingly, the failure of the defendant in hiring the white applicant cannot be said to be evidence of racial discrimination.

The plaintiff also argues that some white applicants are hired with four or five unfavorable factors, pointing to the applicants in Plaintiff's Exhibit 1-4 and 1-5, while blacks with so many unfavorable factors are denied employment. The applicant in Plaintiff's Exhibit 1-4 is discussed above. The applicant in Plaintiff's Exhibit 1-5 is described by plaintiff in brief as having had a bad high school record, his wife being very opposed to his taking the job, and some interviews included questions about his maturity and attitude. However, this applicant's credit record was very good, and his only speeding conviction was six years old at the time of the investigation. It is true that the applicant's wife expressed some concern about the prospect of separation from the applicant during training, but she does not say that she is "very opposed to his taking the job" although the investigator does say that he thinks that if the applicant's wife prevails, he will not accept the position. This applicant was hired but quit during training. The plaintiff asserts that "[n]othing in the black applicant's files, rejected and accepted, from 1973 through 1977 indicates that a black applicant that made this kind of showing would ever have been hired as a trooper." The fact that this applicant quit during his training tends

to prove that his hiring was a mistake. The defendant cannot be expected to conduct error-free hiring proceedings. The fact that this isolated mistake was made on a white person's application is not in itself evidence of racial discrimination. Further, the bare assertion by plaintiff, unsupported by an analysis of all black applicants' files cannot be accepted as proven.[15]

Plaintiff suggests that the rejected black applicant in Plaintif's Exhibit 4-7 should be contrasted with the hired white applicants in Plaintiff's Exhibit 1-1, 1-11, and 1-12. Plaintiff suggests that the conduct which resulted in the black applicant being rejected, living with a person out of wedlock, was overlooked in the case of the white applicants. The applicant in Plaintiff's Exhibit 4-7 had a bad credit record as well as her co-habitation. Her credit record includes three judgments and five overdue accounts. It is clear from the recommedation of the investigator that the bad credit record of the applicant was as important a factor as the co-habitation. The investigation revealed that although the applicant wished to marry the man with whom she was living, no marriage was planned because he did not wish to settle down. The couple had lived together for a considerable period of time, and a child was being reared in their home.

The applicant in Plaintiff's Exhibit 1-11, during a three-month interval, lived with a woman out of wedlock. The investigation showed that the applicant felt very bad about the incident. The applicant first went to live with his girlfriend after his mother had forged some checks on his checking account, and he came back to live with his mother after three months. The applicant was ashamed of the situation and expressed remorse to the investigator. Unlike the applicant in

Plaintiff's Exhibit 4-7 this applicant had an excellent credit record.

The applicant in Plaintiff's Exhibit 1-12 also had a credit record without blemish. He was a former employee of the F.B.I. and had very good recommendations. The investigation revealed that this applicant moved in with his wife-to-be two months before their marriage when he came back from a trip to find that his roommates had moved out of the apartment they were sharing and he was stuck with the rent. Rather than pay the high rent alone, he moved in with his fiancee and moved their wedding date from August to May 1976. This was in March of 1976. The investigator recommended that this applicant be employed, but the Captain who reviewed the investigation recommended against the employment of this applicant solely on grounds of the two-month cohabitation prior to marriage. Colonel Burgess overrode the Captain's objections.

The applicant in Plaintiff's Exhibit 1-13 dated other women while he was separated but still married. The woman involved said that the relationship between her and the applicant was merely friendship and not an "affair," and that they had been to the movies together and to her home several times. This applicant had a good credit rating and only one speeding conviction several years earlier. He was not recommended for employment by one investigator because of his marital difficulties, but he was hired nonetheless.

The Court sees with respect to cohabitation fundamental difference between the situation of the black applicant who was not hired and that of the white applicants who were hired. The behavior of the white applicants who were hired is more properly compared with the behavior of the black applicant in Defendant's Exhibit 122(E). This

applicant lived with his wife before marriage, but married her during the background investigation. The investigation revealed that he was $94.50 delinquent on his college loan. This applicant was offered employment by the Virginia State Police despite the fact that he was not recommended by the investigator because of his cohabitation and delinquency on his college loan. When the applicant declined to accept the employment offered, he was called by Captain Olive who attempted to get him to reconsider. This history of an effort to employ a black applicant who had cohabited before marriage with his wife-to-be demonstrates that brief anti-nuptial cohabitation by black applicants is considered by the Virginia State Police on the same basis as cohabitation by white applicants is considered.

This may be an appropriate point to remark that the Court is disturbed by the manner in which the Plaintiff has presented the evidence on disparate treatment of black applicants on the cohabitation issue. This presentation is the product of either a failure to glean the record or a failure to fairly present the evidence known to the plaintiff. In either case, the plaintiff's handling of the cohabitation issue has cast a pall over its entire case on the disparate treatment of black applicants in the background investigation.

With respect to poor employer references the plaintiff suggests that the black applicant in Plaintiff's Exhibit 4-11 should be compared with the successful white applicants for clerk-typist positions at Plaintiff's Exhibit 3-4 and 3-7. The black applicant in Plaintiff's Exhibit 4-11 was fired from a part time job in 1974 for not doing what her boss told her to do. The recommendations received from her present employment with Culpeper County were mixed - some recommended her while

others said that her work was sloppy. Of the five "satisfactory" accounts mentioned by the plaintiff, one was three months behind in payment and one was one and one-half months behind and showed two late notices. This is in addition to the account rated slow and the New York account turned over to a collection agency. When the investigator went to the applicant's place of work, the Culpeper Juvenile Probation Office, the applicant was reading a book called The Prostitute and when she put the book down she put it in plain sight of visitors. The investigator said that the applicant is hard to understand when answering the telephone. The applicant said that she quit a part-time job on the ground that though she had been told by the manager when she was hired that she wouldn't have to stock shelves the assistant manager insisted that she stock shelves. This incident was the most important factor (named first by the investigator) in the investigator's decision not to recommend the applicant. This applicant was 21 years when she applied.[16]

The white applicant in Plaintiff's Exhibit 3-4 was 35 years old at the time she applied. Her references at the Gravely Furniture Co. were mixed. Her immediate supervisor said the problem was incompatability and that her work was good. The applicant had an excellent credit rating. The investigator's visit to her place of employment found the applicant busy and neat.

The white applicant in Plaintiff's Exhibit 3-7 had mixed recommendations from the Salem Police Department. Her immediate supervisor said she was a good worker, while others said that she wasn't. The Roanoke County Circuit Court Clerk gave a bad recommendation but the investigator thought that the Clerk had confused the applicant with another girl by the same name who worked there at the same

time. The applicant had a fair credit rating. The investigator said "nothing derrogatory was developed in her background investigation."

The Court does not find that the applicants in Plaintiff's Exhibit 3-4, 3-7, and 4-11 are of equal or of nearly equal merit. Accordingly, the failure of the defendant to hire the black applicant is not evidence of racial discrimination.

Plaintiff questions the Superintendent's use of background investigations. The plaintiff argues that the reasons given by the Superintendent for rejecting the black applicant in Plaintiff's Exhibit 2-7 were in fact pretexts for racial discrimination. The Superintendent testified that he rejected the black applicant mainly because he admitted participating in a breaking and entering episode, had contracted venereal disease twice while being investigated, and had had his driver's license revoked for two charges of speeding. (Tr. 8-59). Exhibit 2-7 indictes that there was evidence in two interviews that this applicant had a generally good employment record with only one bad recommendation, that of the Yellow Cab Company. The applicant's Exxon account was unpaid and had been turned over to a collection agency. Two cases of gonnorrhea were treated shortly before his background investigation began. The breaking and entering charge was a juvenile charge against the defendant which was nolle prossed. The defendant asserts that the investigator's report on the applicant's criminal history which was attached to the background investigation showed that the applicant admitted direct involvement in the crime. The Court accepts that as an accurate representation though the report furnished as a part of Plaintiff's Exhibit 2-7 is almost illegible. The defendant also claims that the Department of Motor Vehicles record which is listed

as an attachment to the report in Plaintiff's Exhibit 2-7 reflects that the applicant's driver's license had been suspended. This record was omitted from Plaintiff's Exhibit 2-7. The Court cannot conclude on the basis of this evidence that the Superintendent's reasons for refusing to hire this applicant are mere pretexts for racial discrimination.

The plaintiff impugns the professed skepticism of the Superintendent about the honesty of the black applicant in Plaintiff's Exhibit 2-12. The background investigation reveals that this applicant had a very poor academic record, but was very highly recommended by his current employer and had excellent credit. He was recommended for favorble consideration by the investigator. The investigation revealed that he had been convicted of passing a bad check in December, 1968, nine years before the background investigation. The applicant was sentenced to pay the amount of the check and explanation of the circumstances behind his bad check charge.

The investigation also revealed that the applicant got his Virginia driver's license in 1965 by lying about his age. When the investigator first confronted the applicant with this discrepency, he said that at the time he thought that his age was correct. The next day the applicant told the investigator that he had lied to the investigator on the previous day, and that he had in fact advanced his age when he applied for his driver's license in order to get a license to be eligible for a job. After he was rejected, this applicant spoke to Captain Olive about the circumstances surrounding his rejection. Captain Olive wrote that but for this misrepresentation to the investigator, he would have recommended reconsideration to the superintendent. It is true

that had the applicant not voluntarily revealed his misrepresentation to the investigator, the lie would have gone undiscovered. Nevertheless, the incident showed that the applicant would succumb to the temptation to tell a lie when it was to his advantage.

This is contrasted by plaintiff with the white applicant in Plaintiff's Exhibit 32-6, who is presently employed by the Virginia State Police. This applicant also advanced his age one year to get a driver's license. However, the applicant volunteered this information to the investigator, and never misrepresented the circumstances. The investigation revealed that he moved his age up one year so that he could get a license to drive a truck while his father was sick. The two applications on this issue are not of equal weight. It is clear from the contemporaneous memorandum of Captain Olive that the misrepresentation that concerned the Virginia State Police in considering the application in Plaintiff's Exhibit 2-12 was not the original misrepresentation to get a driver's license, but the misrepresentation to the investigator at the time of the background investigation. No such misrepresentation appears in Plaintiff's Exhibit 32-6.

Plaintiff is critical of the investigator's conclusions with respect to the academic record of the black applicant in Plaintiff's Exhibit 2-2. This applicant graduated from high school 86th in a class of 143. The investigation revealed that one possible explanation for this low class standing was the applicant's part-time work during his high school career. However the Court believes that this applicant's poor academic record had very little to do with his not being offered a job. The applicant's wife told the investigator that she was amazed that the Virginia State Police could find

people to work for such low pay as they were paying. She said that she opposed her husband's taking the job of trooper because it would mean that she could not go to college. The applicant said that his take home pay at the time of the investigation was between $16,000-$18,000[17] and he was clearly concerned that he couldn't get by on a trooper's salary. In the course of the background investigation, the applicant withdrew his application, then asked later to be considered. It is not surprising that this applicant was not offered a position with the Virginia State Police.

The plaintiff claims that the background investigation of the black applicant in Plaintiff's Exhibit 32-7 shows bias on the part of the investigator because the investigator questioned the applicant's veracity in concluding that the applicant was involved with a woman who was separated from her husband. The plaintiff points to the fact that both the woman and the applicant denied that the relationship was a romantic one. Both claimed that they were just good friends. The investigator, however, after face-to-face interviews with both parties formed the conclusion that each was attempting to conceal the true nature of the relationship. Surely the investigator would have been derelict in his duty had he not given the Superintendent the benefit of his conclusion in this matter. The applicant also wrote on his application that he had left his first job to "return to school." His employer, on the other hand, said that he was fired from his job when he failed to report to work one day, and the applicant admitted this to be true, but said that he could get the job back anytime he wanted. Under these circumstances, the Court cannot conclude that the investigator's opinion as to the veracity of the applicant is the result of racial bias.

The plaintiff contends that the background investigation in Plaintiff's Exhibit 2-6 is incomplete, inaccurate, and misleading. This black applicant was not recommended for police employment by his supervisor at his previous job with the Richmond Public Schools. The plaintiff says the background investigation reflects that he converted to his own use a $7.00 check. Actually, the background investigation reveals that he accepted a check from a client of his employer and then failed to turn it in to his employer. He said he lost the check when asked later. His supervisor at the Richmond Public Schools also claimed that the applicant was a sloppy dresser and once used a school camera for personal gain. The background investigation reflects that this applicant had two bad check accounts in 1972. The investigator reported that the applicant came shabbily dressed to his interview and that the interview indicated that the applicant could not accept close supervision without rebellion. The plaintiff complains that a letter from the applicant's present employer was not included in the investigation. However, the letter was included in the file and would have been available for review by the Superintendent when making his decision whether or not to hire the applicant. The letter arrived at the Virginia State Police before the investigative report was typed up but after the investigation was completed, according to the dates on page one of the investigation. The investigator's report of the applicant's interview does not reveal any explanation from the applicant as to the supervisor's statement that the applicant had lost a $7.00 check and had used a camera belonging to his employer for personal gain. This is somewhat unusual, at least judging from the investigations that the Court has reviewed in this case, but it is not sufficient to base a conclusion of racial discrimination.

The plaintiff complains of the investigator administering a literacy test to the black applicant in Plaintiff's Exhibit 2-5. The investigator had the applicant write a short paper on why he wanted to be a trooper and asked the applicant to read two sections of the Code of Virginia. The plaintiff contends that "such measures were not taken with similarly situated whites and suggests further harassment of black applicants." However, the evidence shows that the white applicant in Plaintiff's Exhibit 1-4 also was given a writing test. On page ten, paragraph three of the background investigation, the investigator talks about "reviewing _____'s essay" and asking the applicant about his spelling errors. Despite plaintiff's claim in its brief that such measures were not taken with "similarly situated white," plaintiff was aware of this writing test given to this white applicant. On page twenty-nine of plaintiff's post trial brief, the plaintiff points to this applicant as a white applicant with four or five unfavorable factors including the factor "cannot spell (p. 18, BI)."

Plaintiff refers to the background investigation of the black applicant in Plaintiff's Exhibit 2-5 as being distorted because the investigator listed fourteen notices sent to the applicant in an account that should have been paid on 27 March 1972 but was actually paid on 18 April 1972. The background investigation clearly reflects the fact that the applicant got behind in his payments by one month and never caught up. This was the occasion for the fourteen notices. The investigation also reveals four credit accounts that reflected late payment. There was, in addition, sufficient cause not to hire this applicant independent of both his academic ability and his credit problems as the Court has noted above.

D.

a.

In addition to its review of the investigation reports plaintiff presented the testimony of three black applicants for trooper positions who failed to pass the background investigation. One of these, Harvey Louis Graves, testified that an investigator for the Virginia State Police disclosed to Graves' wife some information that was developed in the course of the background investigation which had a deleterious effect upon his relationship with his wife. He also testified that he withdrew his application for a trooper position after the investigator warned him that if the investigation disclosed that he had violated the law he might be prosecuted for that violation. Graves testified that he was not afraid at the time of the investigation that any information would come to light indicating that he had broken the law. Graves said that the effects on his relationship with his wife and the fact that he did not wish to be concerned with even baseless prosecution caused him to withdraw his application.

The Court finds Graves' testimony somewhat enigmatic. It definitely shows that something unpleasant happened to Graves in the course of his background investigation. However, there is nothing in the testimony to indicate that Graves was or that he felt he as being discriminated against because of his race. The testimony excludes the nature of the disclosure by the investigator to the applicant's wife of the "personal and private" information. There is no indication of what prompted the investigator to tell Graves that if the investigation revealed a violation of the law that Graves would be subject

to prosecution. Having read scores of investigative reports and having taken note of the careful, detailed objectivity of the investigative officers the Court cannot assume from the happening of the event that racial discrimination was involved.

The plaintiff also presented the testimony of Charles Melvin White, who applied for a trooper position with the Virginia State Police in 1969 or 1970. This is, of course, prior to the effective date of the Act. White was not offered a position. After he was rejected, he went to see Colonel Burgess to ask why he had not been offered a position. According to White, Colonel Burgess told White at the time that he had personally reviewed White's file. Burgess mentioned the fact that White had been involved in a labor dispute and had once been arrested for disorderly conduct. Tr. 1-151-55. In his testimony, Colonel Burgess said he rejected White because there was some question about his emotional stability, and because he had been involved as a leader in a labor dispute involving some violence. Colonel Burgess felt White would have difficulty remaining neutral in labor disputes which he might be assigned to control as a State Trooper. Tr. 7-59.

There are some very positive factors in White's record, including his honorable military service and his quest for a college education, which would lead the Court to believe that he might well have made an excellent State trooper. However, the Court cannot conclude, as the plaintiff would have it conclude, that Colonel Burgess was motivated by racial discrimination in refusing to hire White. The concerns expressed by Colonel Burgess are real ones, and the Court finds that they were not used as pretext for racial discrimination.

The plaintiff presented the testimony of Michael Lee Patillo, who applied for employment with the Virginia State Police in November, 1974. Patillo believes that he was harassed in the course of his background investigation. He testified that the investigators didn't give him time to think over the questions or answer them completely and that the investigator tried to discredit his answers. He also said that the investigator asked him if he were a homosexual and if he were unsociable. When Patillo was taken for a driving test, a standard procedure in a background investigation, the car he was driving was struck from the rear by another car. Patillo said the investigator told him after this incident, "Now you can go tell your mother this." Patillo said that he felt his mother had nothing to do with the accident, and reported that the investigator had also asked if he was somewhat attached to his mother. Tr. 1-156-64.

Colonel Burgess testified that the background investigation on Patillo showed that he was immature had a great deal of dependence on his mother. Tr. 7-77. Colonel Burgess also pointed out that Patillo was not recommended by five former employers, and that he had left two jobs without giving notice. However, Colonel Burgess made it clear that Patillo's apparent lack of maturity was the main factor in his decision not to hire Patillo. Having observed the witnesses the Court sees no reason not to credit Colonel Burgess' testimony.

The plaintiff also introduced evidence that showed that some background investigations included references to the applicants' race such as "The applicant is an above-average black person." Two of the offending investigators, L. W. Coffman and Otto Wegman, were called by the plaintiff to

explain these references to race. The Court finds that such references to race in the background investigation submitted by investigators on a few black applicants are innocent of any anti-black animus and were intended by the investigators to be descriptive only.[18] This conclusion is bolstered by the fact that these characterizations are found in files of black applicants recommended for employment by the investigators.

Considered as a whole, the background investigations adduced by the plaintiff do not show a pattern or practice of racial discrimination. Nor do any of the individual background investigations reveal racial discrimination against any individual applicant. The defendant has, in every case, met its burden to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The plaintiff has not shown that the legitimate reasons stated by the defendant and found by the Court in this case were mere pretexts for racial discrimination.

To the contrary, the Court, having observed the responsible witnesses in open court and having considered the factors that enter into the weight and value of witnesses' testimony, concludes that the bases advanced were valid and true. The background investigations and the decisions to hire or not based thereon are, so far as the Court can discern, free from racial taint or bias. Every applicant accepted for employment as a State trooper can be assured that he or she meets the same high standards as his fellow troopers unblemished by racial considerations. Accordingly, the plaintiff's claim that the background investigation was used as an instrument of racial discrimination must fail.

b.

Of all the blacks who have been hired by the Virginia State Police and despite the extensive discovery and investigation conducted by plaintiff, plaintiff presented the testimony of only two who claim to have been subjected to racial discrimination after being hired by the Virginia State Police. Hollis Lee Jackson was appointed a conditional trooper on 31 July 1976. One month later Jackson resigned his conditional appointment in the Virginia State Police. On that day Jackson was called to the office of Sgt. Rockecharlie, his area supervisor, to discuss a summons issued against him in Charlotte County for nonsupport of an illegitimate child. Jackson claims that the Sergeant proposed to conduct an investigation into the circumstances surrounding the summons which would consist of asking the woman who had obtained the summons whether or not Jackson was the father of her child. Jackson further claims that Rockecharlie gave him the impression that if he resigned, went to Charlotte County and resolved the situation, he could be reinstated. Jackson claims that Rockecharlie got a secretary to type up a letter of resignation and placed the letter before Jackson for his signature. Jackson signed the letter of resignation and left for Charlotte County to try to resolve the problem. When he had been cleared of the charge against him, Jackson returned to the area office to be reinstated. Jackson was told for the first time, however, that State Police policy does not permit reinstatement of troopers who resign.

Sgt. Rockecharlie denied that he told Jackson that if Jackson resigned and got the matter cleared up he could be reinstated. Rockecharlie also testified that Jackson never denied the allegation that Jackson was the father of the child, and in

fact admitted to having sexual intercourse with the woman involved and to paying $20.00 a week to this woman over a substantial period of time for support. Tr. 8-87, Defendant's Exhibit 127. Rockecharlie further testified that Jackson asked him specifically what his alternatives were in this matter, and Rockecharlie told him that one of his alternatives was to resign. Rockecharlie stressed that he did not explain to Jackson the consequences of his being found innocent of the charge against him because Jackson had admitted to him that the charge was valid.

The Court observed both these witnesses, and determines that insofar as their recollections differ, Sgt. Rockecharlie is telling the truth.[19] The Court can find no fault with his handling of the situation raised by the complaint against Trooper Jackson. It may be that the State Police policy against rehiring troopers who resign is too rigid and may result in some injustices. However, it is not the province of this Court to review personnel policy laid down by the Department of the State Police. The evidence is clear that this policy is applied equally to both black and white troopers who resign. The policy is published in the handbook of the Virginia State Police which was issued to Trooper Jackson. The Court can find no evidence of racial discrimination in this incident.

The plaintiff presented the testimony of Therod C. Quarles who entered the basic training school of the Virginia State Police in November of 1976. Quarles was hired after the Virginia State Police had dropped the written test requirement for all applicants. In December, 1976, Sgt. Grimes discussed with Quarles the fact that he was failing the training school at that time. On 10 January 1975 Quarles was informed that he was still

doing unsatisfacotry work and was given the choice of "going before the board or resigning." Tr. 1-145. Quarles resigned. The next day, Quarles recomputed his average and decided that he had a passing average. Although it is clear that Quarles felt the people at the training school were hard on him, and that they had made a mistake, Quarles never says that he believes that the actions of the Virginia State Police personnel were motivated by racial bigotry.

The defendant presented the testimony of Cpt. Charles M. Robinson, training officer for the State police, who testified that Quarles was informed of his right to appeal the decision to terminate his conditional appointment. Robinson also testified that he recomputed Quarles' grade average and found it to be failing, despite Quarles' claim to the contrary. Robinson's testimony shows that Quarles raised his grade point average from 69.2 to 72.75 between 6 December 1976 and 6 January 1977. Tr. 147-50. It is clear that Quarles was improving somewhat and this may be the source of his confusion as to his grade point average. The fact that he may have done passing work during the month of December, however, was not sufficient to bring his grade point average above the 75 mark. It may be that if Quarles had chosen to go before the Board of Review, that this improvement would have led the Board to recommend that he be retained. However, the record shows that the choices of whether to resign or to go before the Review Board was entirely up to Quarles. There is absolutely nothing in this incident to support a charge of racial discrimination against the defendant.

Trooper David Green, the black trooper who has been longest with the force, was asked by the Court if he found any racial discrimination in the

Virginia State Police. Green's answer was straightforward: "No, Sir, I do not. If it's there, I cannot detect it in no kind of way." Tr. 6-30. Trooper Green was a frank and candid witness. The Court was very much impressed with his demeanor on the witness stand. He impressed the Court as an active and intelligent member of the Virginia State Police. If racism in the Virginia State Police were a problem, the Court has no doubt that Trooper Green would have so informed the Court despite the presence of his Superintendent in the courtroom.

The Court also heard the testimony of Trooper Cheryl L. Nottingham, the first female State trooper in Virginia. In addition to denying that she had been subjected to any discrimination because of her sex either at the training school or in her subsequent career, Trooper Nottingham testified that she saw no discrimination against the black troopers in her training class. Tr. 9-186. Trooper Nottingham also testified in response to a question from the Court that the instructors in the basic training school were no harder on the black trainees than they were on the white traines. She indicated they were hard on everybody. Tr. 9-190. Trooper Nottingham also impressed the Court as a frank and honest witness. The Court believes it is highly significant that she, a minority member, saw no evidence of discrimination in the training school. In addition, Trooper Nottingham was a member of the same training school class as Therod Quarles. She testified that Quarles didn't seem to care about becoming a trooper, and indicated he wasn't sure from one week to the next whether he wanted to return to the training school.

The Court concludes, on the basis of this testimony as well as the other testimony in the

case, that the Virginia State Police did not engage in racial discrimination in the training school or in the day-to-day operation of the Department.

E.

The plaintiff contends that the recruiting efforts of the Virginia State Police for both black and female applicants are inadequate and discriminatory. Plaintiff cannot and does not argue that the defendant has not engaged in minority recruitment. The argument is, instead, that the program of minority recruitment carried out by the Virginia State Police is inadequate.

The fundamental problem with this argument, however, is that it properly should include proof of what would be an adequate program. No such proof has been offered by the plaintiff, although some notion of what the plaintiff's attorneys feel would have been a more adequate program can be gleaned by an analysis of their criticism of the program that the Virginia State Police actually ran. There is no evidence in the record to show that such a program - depending heavily upon use of mass media and the employment of numbers of minority recruiters with their adminstrative support, all framed in the latest affirmative action techniques - would have had one iota more effect than the efforts of Trooper David G. Green, canvassing Virginia alone in his State police cruiser talking to prospective applicants one-on-one. Indeed, the testimony of Col. Richard A. King, Chief of the Fairfax County Police Department, shows that Fairfax County was unable to achieve better results than the Virginia State Police despite a considerble investment in recruiting and a substantially higher pay scale. Tr. 1-50, 63. If Chief King's program was intended

as a model it is significant that the model does no better than the Virginia State Police recruitment program.

There is no indication in the record of a lack of funding for the minority recruiting program. Trooper Green was assigned by the Virginia State Police as a minority recruiter in January 1973. Until that time, the Virginia State Police had never sought actively to recruit any person, white or black. It was considered that recruiting was unwise since applicants should be self-motivated to be a State trooper. It is not surprising under these circumstances that no one in the Virginia State Police would be familiar with recruiting techniques. The evidence shows that Trooper Green never experienced any hinderance in the performance of his recruiting duties. To the contrary, he was uniformly assisted and encouraged by his superiors. The record shows that the recruitment effort mounted by the Virginia State Police, though lacking in sophistication, was a good faith and productive effort to attract black applicants to become State troopers.

The plaintiff contends that the applicant flow data reflects the inadequacies of the Virginia State Police minority recruitment program. The evidence shows that the applicant flow with the Virginia State Police was 10.8% black. The Court already considered the question of the applicable labor market figures, and has concluded that the appliable labor market statistics have not been proven by the plaintiff. Thus, plaintiff has not shown that blacks apply to the Virginia State Police in disproportion to their numbers in the relevant labor market. Indeed, the applicant flow is closely in line with defendant's view of the relevant labor market - a view which the Court finds appropriate. There being no proof to support

it plaintiff's attack upon the recruiting policies of the defendant must fail. Moreover, defendant has shown that its recruiting policies are not discriminatory against blacks[20] and are in fact, the result of a good faith effort to seek out black applicants.

The evidence shows that the efforts of the Virginia State Police to attract black applicants have been the subject of widespread news publicity since the beginning of the minority recruitment program in early 1970. These efforts were even the subject of heated controversy when William Robertson, Governor Holton's assistant for minority affairs, publicly chastized the black citizens of the State for their failure to take advantage of the employment opportunities offered in the Virginia State Police. No single feature of American society has characterized it more completely over the past 25 years than the thrust for racial equality. If there are any eligible members of the minority community in Virginia who are unaware of their right without regard to race to obtain employment with the Virginia State Police, then this Court would be very much surprised. Certainly, nothing in the record of this case would lead the Court to believe that there exits any such person. To create such an awareness is the purpose of minority recruitment.

Accordingly, the Court finds that the recruitment policy and program of the Virginia State Police does not discriminate against blacks.

VII

The plaintiff has presented and the Court has considered in this case a massive amount of evidence intended to show that the Virginia State Police discriminated against black applicants for

trooper positions and black conditionally-appointed troopers since the effective date of the Act, 1 July 1973. The testimony of two conditionally-appointed troopers who were arguably forced to resign because of their race, the testimony of four trooper applicants who arguably were not given equal consideration and thus were not hired because of their race, the background investigations of twelve black trooper applicants, and eleven black applicants for civilian positions which arguably show discrimination against black applicants by the background investigators or by the persons responsible for hiring decisions in the Virginia State Police, all have been brought before this Court. This evidence, a result of months of massive pretrial investigation, has been carefully sifted and weighed and in each instance, the Court has found that the individual involved was not the victim of racial discrimination. Nevertheless, it would appear from the very bulk of the evidence in this case, and from the many allegations of racial discrimination, that there must be some racial discrimination practiced by members of the Virginia State Police. Where so much smoke is found, it is hard to believe that there is no fire.

However, a closer analysis of the allegations raised by the plaintiff in this case, and the proof presented to support those allegations, shows that the proffered evidence of discrimination is in fact very sparse. No black trooper who has successfully completed the training school has come forward with a complaint of racial discrimination. From hundreds of black applicants the plaintiff has found only 23 who support even a colorable claim of racial discrimination. Out of hundreds of background investigations, the plaintiff has presented only 21 that show signs of racial characterization. At one point during the trial, plaintiff's counsel assured the Court that

plaintiff's evidence represented not the tip of the iceberg, but the whole iceberg. Tr. 6-73. If this be so, and the Court has no reason to think that it is not, then the very fact that the evidence of racial discrimination presented by the plaintiff is so sparse is significant.

As the Supreme Court said in Teamsters:

> [B]ecause it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the government ultimately had to prove more than the occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure - the regular rather than the unusual practice. [431 U.S. at 336.]

The plaintiff's burden of proof in this pattern or practice suit under the Crime Control Act is the same. Thus, the fact that the plaintiff's evidence is in fact so scarce weighs heavily with the Court. The plaintiff's inability to glean more than this from a record which is no less than five feet thick bolsters the Court's view that the Virginia State Police have not engaged in a pattern or practice of purposeful discrimination since the effective date of the Act. Indeed, the Court has grave doubt that the non-purposeful racial discrimination proven - that with respect to dispatcher hiring - is sufficient to support a pattern or practice finding as defined by Teamsters, supra. Less than half a dozen black dispatcher applicants were screened out by the written test during the entire relevant period. See Table VII. Less than a hundred of approximately 1500 employees of the Virginia State Police are dispatchers. In addition, the use of

the written test was not intended to discriminate against blacks and was discontinued by the defendant more than two years ago.

But the record shows that the defendant never even attempted to justify its use of the written test for dispatcher positions despite the strictures of the Act which compelled a careful review of all hiring policies to remove any vestige of discrimination. The defendant had a policy of hiring as dispatcher only those applicants who passed the written test. The defendant's failure to recognize the disparate impact of that test and take corrective action even in this relatively minor regard must be considered a pattern or practice in violation of the Act.

VIII

The Court has found that the Virginia State Police has engaged in unlawful and discriminatory hiring practices against women by means of height and weight requirements and derelictions in recruiting. The Court has further found that the Virginia State Police engaged in an unlawful employment practice in that it used a written test as a screening device for applicants for the position of dispatcher which, although it had an adverse impact upon black applicants, was not shown to be a valid predictor of job performance. In all other respects, the Court finds for the defendant.

An appropriate order shall issue.

D. Dortch Warriner
United States District Judge

Date: 24 July 1978

FOOTNOTES

1. The interests of the defendants are the same, and both defendants were represented by the Attorney General of Virginia. Accordingly, hereinafter "defendant" shall refer to both defendants collectively.

2. Alexander was a jury selection case, and the special nature of a jury venire as a group representative of a cross-section of the community distinguishes it from hiring cases such as the present case and Teamsters. However, this distinction apparently has not been recognized by the Supreme Court. See Hazelwood, 433 U.S. at 311, n. 17, where the statistical method of calculation of standard deviations is imported to a hiring case from Castaneda v. Partida, 430 U.S. 482 (1977), a jury selection case. Neither logic nor the rules of a statistical analysis would permit the use of standard deviation analysis where selection is being made other than randomly. Tr. 4-44-6, 4-103-6, 10-35-9.

3. The Court has considerable doubt as to the validity of the antidiscrimination regulation promulgated by the Department of Justice prior to the effective date of the Crime Control Act of 1973. However, the Court need not reach the question of the validity of these regulations because the regulations were not cited in the complaint as a basis for liability nor were they raised at any point in the pretrial pleadings or in the Final Pretrial Order. No evidence was introduced at trial for the purpose of showing a violation of the regulations. The regulations were first mentioned in plaintiff's post-trial brief and

in a letter addendum to the post-trial brief. Under these circumstances, the Court cannot properly consider the regulations as a basis for liability.

4. See p. 3, supra.

5. The Court is advised that there is no longer a Trooper Nottingham with the Virginia State Police, Trooper Nottingham having married a Trooper Petska in June 1978.

6. See Dothard v. Rawlinson, 433 U.S. 321, 339-40 (1977)(Rehnquist, J., concurring).

7. Even now, according to news reports, the uniformed White House honor guard for the President imposes a height requirement on men and women alike, thus excluding a disproportionate number of women.

8. The Court has found it necessary to interpret some of the abbreviations used for the titles of the positions found in Plaintiff's Exhibit 22B. For instance, the Court has interpreted "Comp. Syst. An." to mean Computer Systems Analyst. Also, the Court has included all supervisory or foreman jobs among the skilled positions, in line with the view taken by the Fourth Circuit in Patterson v. American Tobacco Co., 535 F.2d 257, 274-75 (4th Cir. 1976).

Although the Court believes that the job of police dispatcher requires skills that can be readily obtained by members of the general population, this job is not included among the unskilled positions because applicants for the position of police dispatcher, unlike applicants for any other civilian position with

the Virginia State Police, were required to pass a written test prior to 1976. Thus, while plaintiff's argument with respect to all other civilian positions was based on purposeful or "disparate treatment" discrimination, the argument with respect to the police dispatcher position is based on disparate impact. If the written test as applied to dispatchers were valid, it could theoretically have disqualified all black applicants without violating Title VII.

9. However, this figure may not reflect the actual labor market from which the State Police draws its employees. See Part V-A, infra and p. 16, supra.

10. In Hazelwood the Supreme Court specifically provided that on remand the defendant should be permitted to re-open its case to try to show by means of applicant-flow data that it had not discriminated against blacks in hiring. Justice Stevens, in dissent, objected strenuously to this practice on grounds of judicial economy, criticizing the Court's action in remanding the case as a departure from well-established rules of procedure. Justice Brennan, concurring, indicated that only the fact that the district court had misapplied the governing legal principles justified the Supreme Court's action in permitting the evidence to be re-opened. Justice white, concurring, suggested that the United States should have been required to adduce evidence as to the applicant-flow as part of its prima facie case.

This Court has considered re-opening the evidence in this case to permit the parties to submit satisfactory evidence on both the

relevant labor market and the applicant-flow questions in the light of the Supreme Court's action in Hazelwood. However, the Court is convinced that such action would be unwarranted and improper. The Supreme Court's action in Hazelwood was clearly motivated by a desire to prevent possible injustice arising out of the district court's erroneous comparison of work-force data with pupil enrollment data. This comparison resulted in a finding for the defendant at the trial level in Hazelwood. The Supreme Court apparently felt that the lower court's view of the law may have persuaded the defendant that applicant-flow data was not necessary or even relevant to its case. This Court is under no such misapprehension and therefore has determined to follow the ancient and well-established rule of procedure regarding the presentation of evidence. Both parties having been given adequate time to prepare for trial, there having been no restriction upon the presentation of the population data, and both parties having rested their respective cases, the parties are entitled to a decision on the record made. To do otherwise would convert a trial into a yo-yo - sending it back for another twirl whenever a lapse in the proof appeared.

11. See, n. 2, supra.

12. The evidence showed and the Court finds that the study conducted by Dr. Harold Edgerton in 1973 revealed that correlation between the written test used by the Virginia State Police and an applicant's training school grade was 0.55, with statistical significance at the 0.001 level. The evidence also showed that Dr. Edgerton is an experienced and distinguished industrial psychologist, and the Court has

reviewed his report and has confidence in his findings.

13. This Court does not believe Dr. Kirkpatrick testified as a disinterested expert. His every aspect, demeanor, expression, inflection and response was characterized by partisanship for the side which had hired him, the plaintiff. In areas where his grasp of the subject matter was extremely suspect, he plunged ahead with opinions and views where he thought his side would benefit. Whenever his excess of zeal would lead him into a trap of his own making, his efforts to lurch free were almost palpable. In over twenty years at the bench and bar, this judge has seen only two other "experts" in the mold of Dr. Kirkpatrick. Of them it could be said that their testimony was disinterested and their opinions sincere only insofar as they coincided with the purposes of their client.

It would probably be improper to say that Dr. Kirkpatrick's lack of objectivity is a result of his expert witness' fee. It is, most likely, based upon his zeal for the enforcement of the Equal Employment Opportunity provision of the Civil Rights Act. But just as a physician's zeal for a healthy body should not blind him to adverse physical conditions, so also should the zeal of the expert in the employment discrimination field for civil rights not render him incapable of giving an unbiased opinion.

14. At the final pretrial conference in this case, the Court, counsel for plaintiff, and counsel for defendant engaged in a lengthy colloquy concerning plaintiff's challenge to

defendant's background investigation. At the end of this colloquy, counsel for plaintiff agreed that it was appropriate for the defendant to gather information on the four factors mentioned above. Tr. of final pretrial conference, p. 153-156. At that time, the Court believed that it was clear to all parties that the plaintiff's complaint revolved around the allegation that the Virginia State Police were taking legitimately and properly obtained information and using it in such a way as to discriminate against blacks. Apparently, the plaintiff did not share this understanding. The Court cannot see how this could be, but it is clear that plaintiff's disparate impact analysis regarding the background investigation is inconsistent with the understanding reached at the final pretrial conference. Nevertheless, the Court has considered the merits of plaintiff's argument and found it meritless.

15. Rebuttals to the assertion may be observed in Defendant's Exhibit 122, which is a collection of background investigations of accepted black applicants. See Defendant's Exhibit 122-I (extramarital affair, unpaid doctor's bill, speeding charge not listed in application, investigator did not think applicant was frank, did not recommend); 122-K (bad credit, left job without notice, lied to supervisor, not frank with investigator, not recommended by investigator); and 122-L (poor academic record, not recommended by several informants, considered immature by investigator, not recommended by two investigators).

16. Plaintiff's Exhibit 4-11 and several other exhibits submitted by plaintiff were difficult

for the Court to decipher because of the apparent lack of care of the plaintiff in duplicating and preparing the exhibits for filing with the Court.

17. The top salary of a trooper after nine years was $13,728 and the beginning salary was $9,600 in 1976. Defendant's Exhibit 104, App. C.

18. One investigator explained that most blacks living in the applicant's area subsisted in substandard, rural housing and survived on marginal incomes. He wanted to make it clear in his report that applicant was not a part of this setting.

19. Jackson's explanation to Sgt. Rockecharlie as to how it happened that he got the woman pregnant is fantastically unbelievable. Defendant's Exhibit 127.

20. Defendant still has no program aimed at recruiting white males.

APPENDIX

C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA

v.

CIVIL ACTION
NO. 76-0623-R

COMMONWEALTH OF VIRGINIA, et al.

O R D E R

In accordance with the memorandum this day filed, it is hereby ORDERED that,

1. The Commonwealth of Virginia, the Superintendent of the Virginia State Police, their employees, successors, agents and assigns, and all other persons acting in concert with them in the performance of State functions, hereinafter referred to collectively as defendant, shall not engage in any act or practice which has the purpose or effect of wrongfully discriminating against any female applicant for the position of trooper or against any black applicant for the position of dispatcher.

2. Defendant shall commence immediately to recruit females for trooper positions using the number of persons presently employed in recruiting, shown by the evidence to be two persons, and two additional recruiters. Defendant must emphasize its purpose to employ women as state troopers by recruitment activities, advertisements, news releases, and other suitable means for a period extending from the date of this order until 1 July 1983. All advertisements, whether printed or

broadcast, notices, brochures, posters and other literature used to recruit trooper applicants must call attention to the fact that the Virginia State Police is receptive to female applicants on an equal employment opportunity basis.

3. Defendant shall commence immediately to recruit blacks for dispatcher positions. Defendant must emphasize its purpose to employ blacks as dispatchers by recruitment activities and other suitable means for a period extending from the date of this order until 1 July 1980. No personnel need be employed or utilized solely for the purpose of recruiting blacks for dispatcher positions.

4. Defendant shall establish a separate line-item in its budget for recruiting black dispatcher positions.

5. Beginning in January 1979 the defendant will file with the Court in January, April, July and October of each year up to and including July 1983 a report containing the following information.

a. The amount of money spent on recruiting women for trooper positions and blacks for dispatcher positions;

b. The number of persons directly involved in the field in recruiting women for trooper positions and blacks for dispatcher positions;

c. The number of applications obtained from women for trooper positions and the total number of applications for trooper positions received;

d. The number of applications obtained from blacks for dispatcher positions

and the total number of applications for dispatcher positions received;

e. The number of women who accept positions as troopers and are sworn in and the total number of persons who accept positions as troopers and are sworn in.

f. The number of blacks who accept positions as dispatchers and the total number of persons who accept positions as dispatchers; and

g. A narrative statement describing the efforts of Virginia State Police to recruit women to be state troopers and blacks to be dispatchers, including a description of any advertising and examples of any written material used, an account of the recruiting, successes and failures, and a description of any modifications in the recruiting program which the defendants plan to implement to improve the program.

These reports will be due on the fifteenth of the month and will cover the three-month period ending on the last day of the preceding quarter. The reporting requirement for information relating to dispatcher positions will not extend beyond July 1980. Plaintiff will have reasonable access to defendant's records during normal busines hours to validate the information contained in any report required by this order.

6. Defendant shall identify and contact in person and by mail all women who applied for

trooper positions but were rejected after 1 July 1973 because they did not meet the height and weight requirement, and all blacks who applied for dispatcher positions but were rejected after 1 July 1973 because they failed the written test given during that period. Each of these persons shall be given a copy of this order and shall be offered employment with the Virginia State Police in the position for which he applied, unless defendant can defeat his entitlement as provided in paragraph 8 of this order.

7. Any person offered employment under paragraph 6 of this order who accepts a position with the Virginia State Police shall be entitled to back pay at the rate of pay prevailing from time to during the interim beginning six months after the date of his application. If the end of the six month period fell during a hiring freeze imposed by the Governor, back pay shall begin at end of the hiring freeze.

8. Defendant may defeat an applicant's claim for employment and back pay by proving in this Court by a preponderance of the evidence that an applicant would not have been hired for lawful reasons had his application been evaluated without reference to the written test or the height and weight requirement. Defendant may defeat an applicant's claim for employment and limit an applicant's claim for back pay by proving by a preponderance of the evidence that the applicant, although eligible for employment at the time of his application, subsequently became ineligible for a reason which would have resulted in his dismissal. In that case, back pay shall be limited to that period of time prior to the applicant's ineligibility.

9. Defendant's liability to any applicant for back pay shall be reduced by the amount that applicant actually earned or reasonably might have earned by the exercise of due diligence during the time for which back pay is due. Defendant shall have the burden of proving this amount by a preponderance of the evidence.

10. Any female who would have applied for a trooper position with the Virginia State Police but for the height and weight requirement and any black who would have applied for a dispatcher position with the Virginia State Police but for knowledge of the discriminatory nature of the written test requirement may file with the Court within thirty (30) days from the last publication required in paragraph 11 of this order an affidavit under penalty of perjury to that effect. Any person who files such an affidavit shall be given a copy of this order by defendant and he will be given a hearing at which he may prove by a preponderance of the evidence that he would have applied for the affected position with the Virginia State Police and when he would have applied, but for his knowledge of defendant's discriminatory policy. The defendant will have an opportunity to participate fully in any such hearing. If any nonapplicant shall carry his burden of proof, he will be considered presumptively entitled to relief just as if he had applied, and the provisions of paragraphs 6, 7, 8 and 9 of this order dealing with applicants will apply fully to him.

11. Defendant shall cause to be published the purport of this order dealing with nonapplicants in at least a two-column, four-inch display advertisement in the Norfolk Virginia-Pilot, the Richmond Times-Dispatch, the Washington Post, and the Roanoke Times once a week for four successive

weeks. The parties shall agree on the proper format and text for publication, but if no agreement shall be reached the Court will resolve the matter in dispute.

12. Any person who seeks relief under the provisions of this order must submit to an appropriate background investigation as if he were a new applicant for a job with the Virginia State Police, and must respond to discovery from the defendant as if he were a party to this action. Any such person shall be advised of these obligations as soon as possible after he is identified and notice thereof shall be included in appropriate publications and correspondence required by this order.

13. The Court will retain jurisdiction over this action until 1 July 1983 for the purpose of monitoring compliance with the provisions of this order. This order may be modified at any time within this period in the interests of justice and to effectuate its purpose of eliminating the vestiges of defendant's unlawful discrimination. Unless extended this injunction shall stand dissolved on 1 July 1983.

Let the Clerk send a copy of this Order and Memorandum to all counsel of record such service to be the equivalent of service in person on the Superintendent of the Virginia State Police.

D. Dortch Warriner
UNITED STATES DISTRICT JUDGE

DATE: 15 September 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA

v.

CIVIL ACTION
NO. 76-0623-R

COMMONWEALTH OF VIRGINIA, et al.

M E M O R A N D U M

On 24 July 1978 this Court found that the defendant had discriminated against women applicants for trooper positions in maintaining a height and weight requirement and in failing actively to recruit women for trooper positions with the Virgnia State Police after the effective date of the Crime Control Act of 1973. This Court further found that defendant discriminated against black applicants for dispatcher positions by the use of a written test as a screening device for applicants which had an adverse impact on black applicants and which was not shown to be a valid predictor of job performance. The Court has now received from the parties their views on the relief necessary and appropriate to make whole the victims of the defendant's discrimination and insure that these violations do not recur.

The Court is convinced that injunctive relief is appropriate in this case. This does not reflect doubt in the Court's mind as to the good faith of the defendants nor a belief on the part of the Court that the Virginia State Police is not committed to the law requiring equal employment

opportunity for women and blacks. Indeed, the Court sees injunctive relief in this case, in part, as a guide for the fulfillment of defendant's desire to comply with the law. A precise statement of the steps which defendants must take to comply with the law will help preclude future litigation as well as fulfill the equitable requirements of the present litigation.

Neither party has requested a hearing on the question of relief, and the Court can see no purpose which such a procedure would serve. The Court's findings in this case came after hearing eleven days of testimony and reviewing thousands of pages of documentary evidence. The Court believes it has all the evidence necessary to reach a decision on the appropriate relief, and apparently the parties concur.

The Court has found on the basis of the evidence offered at trial that the Virginia State Police has a good faith intention to comply wth the law; that the defendant has terminated the non-validated and thus discriminatory job requirements found to exist at trial; that there is no danger that these requirements will be re-imposed absent validation; and that the character of the past violations was not shocking or outrageous but was relatively limited. All of these findings are relevant to the Court's determination of appropriate injunctive relief. United States v. Warwick Mobile Homes Estates, 558 F.2d 194, 197-8 (4th Cir. 1977). However, the evidence shows that there are or may be persons who suffered the effects of defendant's discriminatory practices who have not been made whole, and the evidence also shows that publicity and recruiting efforts can have a substantial effect on the lingering vestiges of discrimination. Accordingly,

injunctive relief will be fashioned to accomplish both the relief to individual victims and the eradication of the present effects of defendant's prior unlawful acts.

The Supreme Court has recently set forth the procedures to be followed in granting individual relief to class members where an employer has been found to have engaged in discriminatory employment practices under Title VII. In Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) the Court said:

> "[P]etitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination. [Citations omitted.]
>
> Only if this burden is met may retroactive seniority--if otherwise determined to be an appropriate form of relief under the circumstances of the particular case--be denied individual class members." [424 U.S. at 772-3]

In Teamsters v. United States, 431 U.S. 324 (1977), the Court considered the question of individual relief in a "pattern or practice" suit brought by the United States Under Title VII. The Court said:

> "When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the

> liability phase of the trial to determine the scope of individual relief.
>
> ....
>
> The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job [Footnote omitted.] and therefore was a potential victim of the proved discrimination. As in Franks, the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons. [431 U.S. at 361-2.]

This, then, is the procedure which will be followed in the present case. The defendant will be required to identify all women who applied for trooper positions but were rejected after 1 July 1973 because they did not meet the height and weight requirement in effect at that time, and all blacks who applied for dispatcher positions but were rejected after 1 July 1973 because they failed the written test given at that time. Each of these persons will be entitled to a job with the Virginia State Police in the position for which he applied if he so desires and if he is otherwise qualified. If he accepts employment he will be entitled to back pay at the rate of pay prevailing from time to time during the interim beginning six (6) months after the date of his application. This six-month period represents the average time which the Virginia State Police would have taken to process an application and offer the applicant a position. If the end of hte six-month period from the application fell during a hiring freeze imposed by the Governor, back pay shall date from the end of

the hiring freeze.

The defendant may defeat an applicant's claim for back pay and employment by proving by a preponderance of the evidence that an applicant would not have been hired for lawful reasons had his application been evaluated without reference to the written test, in the case of dispatchers, or the height and weight requirement in the case of female troopers. The defendant may defeat an applicant's claim for employment now and limit an applicant's claim for back pay by proving by a preponderance of the evidence that the applicant, subsequently became ineligible for a reason which would have resulted in his dismissal. In that case, back pay shall be limited to the period of time prior to the applicant's ineligibility.

The defendant's liability for back pay shall be reduced by the amount any person claiming back pay actually earned or reasonably might have earned by the exercise of due diligence during the time for which back pay is due. See 42 U.S.C. §2000e-5(g).

In Teamsters the Supreme Court distinguished between the positions of those victims of discrimination who actually applied for jobs but were denied them, and those victims of discrimination who were deterred from applying by plaintiff's consistently enforced policy of discrimination. The Court in Teamsters rejected the view that nonapplicants are not entitled to relief, and held that "[i]ndividual nonapplicants must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly." 431 U.S. at 364.

The proposed decree and supporting brief submitted by plaintiff calls for contacting past applicants and offering them jobs and back pay, but does not mention deterred nonapplicants. In its rebuttal brief plaintiff makes only passing reference to "other females whom it is possible to identify" and cites the testimony of Trooper Green that some women were discouraged from applying to the Virginia State Police by the height and weight requirement. The Court is concerned that the United States has virtually overlooked a potential class of actual victims of discrimination who are dependent on the efforts of the United States for redress. Defendant likewise made no reference to such deterred nonapplicants.

Any female who would have applied for a trooper position but for the height and weight requirement and any black who would have applied for a dispatcher position but for knowledge of the discriminatory nature of the written test requirement may file with the Court an affidavit to that effect within thirty (30) days after due publication as provided in the final decree in this case. Any person who files such an affidavit will be given a hearing at which he may prove by a preponderance of the evidence that he would have applied for a position and when but for his knowledge of defendant's discriminatory policy. The defendant will have an opportunity to participate fully in any such hearing. If any nonapplicant shall carry this burden of proof, he will be considered presumptively entitled to relief just as if he had applied on the date proven, and the provisions of the decree dealing with applicants will apply fully to him. The Court will also order that the provisions of the decree dealing with nonapplicant victims of discrimination

be published in a suitable manner at defendant's expense.

Any person who seeks relief under this order must submit to an appropriate background investigation as if he were a new applicant for a job with the Virginia State Police, and must respond to discovery from the defendant as if he were a party to this action. The plaintiff may undertake to represent the individual claimants or a claimant may retain counsel of he may represent himself.

It is on the question of affirmative relief to eradicate the vestigal effects of past discrimination that the parties differ most sharply in their views on appropriate relief. The plaintiff calls for a detailed order setting forth the precise steps which defendant must take to recruit females and blacks, plus a numerical goal which defendant must meet or strive for in hiring females and blacks. The defendant says even if such measures are permitted by law they are unwarranted in this case because of the defendant's good faith and the limited nature of defendant's violations.

The rule in this Circuit is that affirmative relief should be granted where the vestiges of discrimination linger and remain to be eliminated. United States v. Warwick Mobile Home Estates, 537 F.2d 1148, 1150 (4th Cir. 1976); United States v. Hunter, 459 F.2d 205, 220 (4th Cir. 1972). The Court finds that the effects of defendant's policy of discrimination against women and blacks linger in view of the small numbers of women and blacks who hold trooper and dispatcher positions, respectively, and the small numbers of women and blacks who apply for trooper and dispatcher

positions, respectively. Accordingly, affirmative relief will be fashioned to eliminate these vestiges of discrimination

The plaintiff urges that such affirmative relief include numerical goals and timetables as benchmarks for measuring defendant's progress in eliminating the vestiges of discrimination. Plaintiff's brief indicates that a reasonable goal for defendant is to hire women in proportion to their numbers among applicants, but in any event at least fifteen percent (15%) of each training class should be female. Plaintiff argues that such a goal is not a quota because it does not require that unqualified or less qualified persons be hired.

Plaintiff also suggests that a reasonable goal for defendant to attain is to hire enough black dispatchers so that ten percent (10%) of all State Police dispatchers will be black by 31 March 1979 and seventeen percent (17%) of all State Police dispatchers will be black by 31 December 1979.

The Court is not convinced that these goals and timetables are necessary or useful or even proper. First, the defendant justly charges that the fifteen percent (15%) goal set for hiring female trooprs is arbitrary. The only justification given by plaintiff for a fifteen percent (15%) goal is that such a goal is roughly one-third (1/3) of the percentage of the civilian labor force that is female according to the 1970 census. Plaintiff further offered to "negotiate" the percentage by suggesting it has always been available to discuss defendant's suggestions for an appropriate percentage. But the defendant has steadfastly opposed numerical goals in this suit as a matter of principle. Thus, plaintiff could not

reasonably have expected defendant to come forward with proposals as to what percentage was reasonable. It was instead the duty of plaintiff to advance and support by cogent argument the legal necessity for and the reasonable nature of a goal.

The courts of appeals have carefully scrutinized the bases used by district courts to impose goals on defendants in Title VII cases. In Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), cert. den. 429 U.S. 920 (1976), the Fourth Circuit disapproved of the district court's use of the gross percentage of blacks and women in the whole workforce as a goal for preferential hiring to remedy past discrimination in hiring supervisors. The percentage of black and female supervisory personnel, the Court of Appeals noted, would be a more realistic measure. 535 F.2d at 275.

In Rios v. Enterprise Ass'n Steamfitters Local 638, 502 F.2d 622 (2nd Cir. 174) the district court set a goal of thirty (30%) black membership in a union which had been found guilty of discrimination. The court of appeals remanded the case to the district curt for an explanation of how the thirty percent (30%) goal was arrived at. In so doing the court of appeals disapproved of the district court's reliance upon general population statistics, and also suggested that only male workforce statistics were relevant, saying, "Women have never sought to become steamfitters." 502 F.2d at 632.

In the present case the difficulties are compounded by the facts that until very recently women have not sought to become state troopers, and even now the proportion of women who might wish to become state troopers is a matter of conjecture.

As in Rios, the purpose of any goal imposed by this Court would be to increase the proportion of any goal imposed by this Court would be to increase the proportion of women in the ranks of the Virginia State Police to the level it would be if there had been no discrimination. If this proportion cannot be determined no goal may be imposed. Neither of the parties has suggested a method by which it might be determined much less proven one, and the Court is at a loss to find such a method.

Plaintiff's suggestion that women be hired in the same proportion as they apply appears at first to have some merit. If troopers were hired randomly with respect to sex then the proportion of applicants would provide a rough guide. The proportion of women among applicants would, in effect, be viewed as the proportion of women in the "available labor market." But plaintiff also suggests and the Court will require that a vigorous campaign be mounted to recruit women for the State Police. The Court believes that the sample of women who apply as a result of a recruiting campaign would not be a random sample of female applicants. It is likely to contain more chaff and less wheat than a random sample. Further, trooper selection is far from a random process. The Court concludes, therefore, that a goal of hiring women as troopers in the same proportion as they apply is also inappropriate.

Plaintiff's suggested goals and timetables for hiring blacks as dispatchers are apparently based on a view that in order to eradicate the vestiges of defendant's discrimination, defendant's dispatcher force must within fifteen (15) months reflect the racial makeup of the civilian labor force in the 1970 census. While this suggestion is not so patently arbitrary as the fifteen percent

(15%) goal for female troopers, it nevertheless suffers from many of the same deficiencies pointed out above. In addition, the seventeen percent (17%) goal is not shown to be reasonable in view of the slow turnover rate of the defendant's dispatcher force and the relatively small number of dispatchers employed by the defendant.

However, by far the most significant reason for the Court to decline to establish numerical goals is that the Court finds that numerical goals, if proper at all, are not necessary to achieve the remedial end of eliminating the vestiges of defendant's discrimination. It is the Court's view that the recruiting efforts mandated below will be effective in getting qualified blacks and females to apply in sufficient numbers to offset the present dearth of blacks and females in defendant's dispatcher and trooper ranks, respectively. At least those who want to be dispatchers or troopers will know they can be so employed without regard to race or sex. This is the ultimate desideratum.

Defendant must commence recruiting females for trooper positions without delay by use of the present recruiters as well as two additional recruiters. These new recruiters need not be female. Although the Court appreciates that the defendant prefers to use as recruiters troopers who are members of the special group they seek to recruit, this preference must bow to the necessity to begin immediately to dispel the males-only image of the State Police and assure all women who wish to apply of equal consideration with men. The Court has no doubt that female state troopers would be more effective in this role. Defendant's brief indicates that at least one female trooper will be available for recruiting duty within the next nine (9) months. At that time the defendant may choose

to assign a female trooper to replace one or both of the extra recruiters mandated by the decree. In the meantime, the defendant will have to do the best it can with what it has.

No preferential treatment to any female or black because of the imbalance which exists in the number or percentage of females employed as state troopers or blacks as dispatchers compared with the total number of percentage of females or blacks in the available workforce in the Commonwealth of Virginia will be required. Nevertheless defendant must emphasize its purpose to employ women as state troopers by recruitment activities, advertisements, news releases, and other suitable means for a period extending from the date of the decree until 1 July 1983. All advertisements, whether printed or broadcast, notices, brochures, posters and other literature must call attention to the fact that the Virginia State Police is receptive to women applicants on an equal employment opportunity basis.

Defendant must begin immediately to recruit blacks for dispatcher positions. The discrimination against black applicants for dispatcher positions was very limited in its impact, and probably resulted in fewer than half a dozen black applicants for dispatcher positions being rejected. Accordingly, defendant's efforts to recruit black applicants for dispatcher positions need not be as intense or as prolonged as its efforts to recruit female applicants for trooper positions. No additional personnel need be added or utilized for the sole purpose of recruiting blacks to be dispatchers and the Court will not require reports on recruiting blacks as dispatchers after July 1980. Nevertheless, the efforts mandated by the Court's decree must be

undertaken vigorously and in good faith.

Certain administrative and reporting requirements will be imposed to enable the Court to monitor defendant's compliance with the decree. First, the defendant will be required to establish a separate line-item in its budget for recruiting black dispatchers and women troopers. Second, beginning January 1979 the defendant will be required to file in January, April, July and October of each year up to and including July 1983, a report containing the following information.

1) The amount of money spent on recruiting women for trooper positions;

2) The number of persons directly involved in the field in recruiting women for trooper positions;

3) The number of applications obtained from women and the total number of applications received;

4) The number of women offered positions as troopers and the total number of persons offered positions;

5) The number of women who accept positions as troopers and are sworn in and the total number of persons who accept positions and are sworn in; and

6) A narrative statement describing the efforts of the Virginia State Police to recruit women, including a description of any advertising and examples of any written material used, an account of the recruiting successes and failures, and a description

of any modifications in the recruiting program which the State Police plan to implement to improve the program.

These reports will be due on the fifteenth of the month and will cover the three-month period ending on the last day of the preceding quarter. Plaintiff will have reasonable access to the records of the defendant during normal business hours to validate the accuracy of any matter set out in defendant's reports.

The purpose of these affirmative requirements is to create a hiring pattern which within five (5) years will be wholly free from the lingering vestiges of sex discrimination previously practiced by defendant and found in this case to be unlawful, to the end that by 1 July 1983 it can reasonably be accepted that any "imbalance" then existing between the proportion of women in the defendant's workforce is the result of a reluctance on the part of women to be state troopers and not the product of artificial barriers to entry raised by the defendant or the after effects of those barriers.

Beginning in January 1979 and extending up to and including July 1980 the defendant shall file an additional report setting forth the same information on its efforts to recruit blacks as dispatchers.

It appears to the Court that the question of continued L.E.A.A. funding for the Virginia State Police is not properly before the Court, and therefore no decision will be made regarding that aspect of the case.

An appropriate order will issue.

D. Dortch Warriner
UNITED STATES DISTRICT JUDGE

DATE: 15 September 1978

APPENDIX

D

Sections 703(a) and (b) of Title VII of the 1964 Civil Rights Act, as Amended.

SEC. 703.(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

***

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided

that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

APPENDIX

E

Sections 518(a), (b), (c)(1) and (c)(2)(E) of the Omnibus Crime Control and Safe Streets Act of 1968, as Amended.

Sec. 518. (a) Nothing contained in this title or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other law enforcement agency of any State or any political subdivision thereof.

(b) Notwithstanding any other provision of law nothing contained in this title shall be construed to authorize the Administration (1) to require, or condition the availability or amount of a grant upon the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

***

(c)(1) No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any program or activity funded in whole or in part with funds made available under this title.

APPENDIX

F

Equal Employment Opportunity Commission

Guidelines
On
Employee Selection Procedures

29 C.F.R. 1607

§ 1607.1 Statement of purpose.

(a) The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

(b) An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retrain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score

levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes projected by title VII may result in the rejection of many who have necessary qualifications for successful work performance.

(c) The guidelines in this part are designed to serves as a workable set of standards for employers, unions and employment agencies in determining whether their selection procedures conform with the obligations contained in title VII of the Civil Rights Act of 1964. Section 703 of title VII places an affirmative obligation upon employers, labor unions, and employment agencies, as defined in section 701 of the Act, not to discriminate because of race, color, religion, sex, or national origin. Subsection (h) of section 703 allows such persons "...to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

§ 1607.2 "Test" defined.

For the purpose of the guidelines in this part, the term "test" is defined as any

paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test: includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirement, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

§ 1607.3 Discrimination defined.

The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of clases protected by title VII constitutes discrimination unless: (a) the test has been validated and evidence a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

§ 1607.4 Evidence of validity.

(a) Each person using tests to select from among candidates for a position or for membership

shall have available for inspection evidence that the tests are being used in a manner which does not violate § 1607.3. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(b) The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significant, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(c) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of

or performance at a higher level job is a relevant criterion in validating employment tests only when there is high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the vaidation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity specific to each unit may not be required: Provided, That no significant difference exist between units, jobs, and applicant populations.

§ 1607.5 Minimum standards for validation.

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street NW., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity if not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of

the content (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Test must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test

manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisor's prejudice, as when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the

minority group in question. (See § 1607.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately

few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 1607.6 Presentation of validity evidence.

The presentation of the results of a validation study must include graphical and statistical representation of the relationships between the test and the criteria, permitting judgments of the test's ucility in making predictions of future work behavior. (See § 1607.5(c) concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the mimimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutof score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

§ 1607.7 Use of other validity studies.

In cases where the validity of a test cannot

be determined pursuant to § 1607.4 and § 1607.5 (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature; may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any person citing evidence from other validity studies as evidence of test validity for his own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in paragraphs (a) and (b) of this section.

§ 1607.8 Assumption of validity.

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of test practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technially sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 1607.9 Countinued use of tests.

Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue: Provided: (a) The person can cite substantial evidence of validity as described in § 1607.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

§ 1607.10 Employment agencies and employment services.

(a) An employment service, including private employment agencies, State employment agencies, and the U.S. Training and Employment Service, as defined in section 701(c), shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard not validated in accordance with these guidelines.

(b) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation herein because the test user did not request such validation or has requested the use of some lesser standard than is provided in these guidelines.

(c) Where an employment agency or service is requested only to administer a testing program which has been elsewhere devised, the employment agency or service shall request evidence of validation, as described in the guidelines in this part, before it administers the testing program and/or makes referral pursuant to the test results. The employment agency must furnish on request such evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall not be deemed sufficient evidence of validity (see § 1607.8(a)). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in § 1607.7.

§ 1607.11 Disparate treatment.

The principles of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard-even though validated against job performance in accordance with the guidelines in this part-cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be affored the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other

employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

§ 1607.12 Retesting.

Employers, unions, and employment agencies shold provide an opportunity for retesting and reconsideration to earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

§ 1607.13 Other selection techniques.

Selection techniques other than tests, as defined in § 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option

of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

§ 1607.14 Affirmative action.

Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order 11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by title VII.

No. 80-346

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MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH OF VIRGINIA AND
COLONEL DENNY M. SLANE, SUPERINTENDENT
VIRGINIA STATE POLICE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, having in an unchallenged ruling reversed the district court's refusal to hear the United States' claims under Title VII and remanded the case for reconsideration under that statute, erred in directing the district court to reconsider its rulings (1) on civilian hiring in light of an intervening court of appeals decision as to the burdens of proof under Title VII with respect to applicant qualifications; (2) on background investigations of trooper applicants in light of applicable Title VII guidelines; and (3) on test validation in light of the same guidelines.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405	11, 12
American Construction Co. v. *Jacksonville, T. & K. W. Ry.*, 148 U.S. 372	6
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327	6
Craig v. *County of Los Angeles*, 626 F.2d 659	14
Dothard v. *Rawlinson*, 433 U.S. 321	8, 12
EEOC v. *Radiator Specialty Co.*, 610 F.2d 178	5, 6-7
Griggs v. *Duke Power Co.*, 401 U.S. 424	11, 12
Guardians Ass'n of the New York City Police Dep't, Inc. v. *Civil Service Comm'n of the City of New York*, 23 Empl. Prac. Dec. ¶ 31,153 (2d Cir. July 25, 1980)	14
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251	6
Hazelwood School District v. *United States*, 433 U.S. 299	5, 7
Image of Greater San Antonio, Texas v. *Brown*, 570 F.2d 517	14
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324	7, 9
National Education Ass'n v. *South Carolina*, 434 U.S. 1026, aff'g mem. *United States* v. *State of South Carolina*, 445 F.Supp. 1094	13-14
Richardson v. *McFadden*, 540 F.2d 744	14
United States v. *City of Buffalo*, 457 F.Supp. 612	14
United States v. *City of Chicago*, 549 F.2d 415	14

PRECEDING PAGE WAS BLANK

Cases—Continued Page

United States v. *Commonwealth of Virginia*, No. 76-0623-R (E.D. Va. Apr. 7, 1977) 2
Washington v. *Davis*, 426 U.S. 229 .....11, 12, 13

Constitution, statutes and regulations:

United States Constitution, Fourteenth Amendment 14
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 2

42 U.S.C. 2000e-6(e) 2

Omnibus Crime Control and Safe Streets Act of 1968, Section 518(c)(1), 42 U.S.C. 3766(c)(1).. 2
5 U.S.C. 3304 12
EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 (1976) 9

29 C.F.R. 1607.11 10

Miscellaneous:

Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295 *et seq.* (1978) 9

Section 2A, 43 Fed. Reg. 38296 (1978) 9
Section 6B(1), 43 Fed. Reg. 38299 (1978) 10
Section 14B(3), 43 Fed. Reg. 38301 (1978).. 11

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 620 F.2d 1018. The opinion of the district court on liability (Pet. App. B) is reported at 454 F. Supp. 1077. The opinion of the district court on relief (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1980, and a petition for rehearing was denied on June 3, 1980 (Pet. App. A). The petition for a writ of certiorari was filed on September 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves alleged discriminatory employment practices of the Virginia State Police (VSP).[1] Before 1969, no blacks and no women had ever been employed by the VSP as state troopers. Between 1969 and 1972, only four blacks were hired as state troopers, and only 3.3% of the new troopers hired between 1972 and 1976 were black. No woman was offered a position as a state trooper prior to 1976 (Pet. App. B13). In 1975, only 11 of the VSP's 1104 troopers were black, and all of the troopers were male. In civilian positions with the VSP, blacks were relegated to the lower-paying and less desirable positions, and no black applicants were selected for

[1] This statement of the case, unless otherwise indicated, has been taken from the district court's liability opinion of July 24, 1978 (Pet. App. B3-B5) and the court of appeals' opinion of April 17, 1980 (Pet. App. A3-A6).

any of the VSP's 85 dispatcher positions prior to 1977.

On December 23, 1976, the United States brought this suit against petitioners, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), and of Section 518(c)(1) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3766(c)(1) (the Crime Control Act). The complaint alleged that petitioners had engaged in a pattern and practice of discrimination against black applicants for civilian positions with the VSP, and against both black and female applicants for positions as state troopers.

The district court dismissed the United States' claims under Title VII, on the ground that the suit was instituted by the Attorney General rather than by the Equal Employment Opportunity Commission (EEOC), as required by 42 U.S.C. 2000e-6(e). *United States* v. *Commonwealth of Virginia*, No. 76-0623-R (E.D. Va. Apr. 7, 1977). The case proceeded to trial on the merits of the United States' claims under the Crime Control Act.

The district court in its opinion and order on the liability aspect of the Crime Control Act claims (Pet. App. B) found that, prior to July 1, 1973, the effective date of the antidiscrimination provisions of the Act, Virginia had discriminated against black applicants for civilian positions and against both black and female applicants for trooper positions (*id.* at B4), and that, after the effective date of the Act, it continued to discriminate against female applicants for trooper positions by use of height and weight requirements (*id.* at B19)[2] and against black appli-

[2] The court also found that the VSP failed actively to recruit female applicants after the effective date of the Act (*id.* at B17).

cants for the civilian position of dispatcher by use of an unvalidated written test (*id.* at B29). However, the court found that the Commonwealth had not discriminated against black applicants for trooper positions or for the remaining civilian positions after the effective date of the Act. More specifically, the court found, *inter alia*, that: (1) there was no evidence in the record as to which of VSP's civilian positions require skills that are commonly held or easily learned, which positions require more specialized skills, and how many blacks in the available labor force possess those specialized skills, and there was therefore no basis for determining that blacks are so underrepresented in civilian positions with the VSP that racial discrimination can be inferred (Pet. App. B23); (2) background investigations of applicants for trooper positions revealed neither a pattern and practice of racial discrimination nor any instance of racial discrimination against any individual applicant, since in each instance the Commonwealth articulated a legitimate, nondiscriminatory reason for the applicant's rejection and those reasons were not shown to be pretexts masking racial discrimination (*id.* at B71);[3] and (3) a written examination required for applicants for trooper positions had a disparate impact on black applicants, but the test had been properly validated against training school performance and its use therefore was not an unlawful employment practice (*id.* at B41, B45).

In its opinion and order on remedies (Pet. App. C), the district court enjoined the Commonwealth from discriminating against black applicants for posi-

[3] The court also rejected the United States' claim that the use of background investigations as a selection device had a disparate impact on black applicants (*id.* at B50).

tions as dispatchers and female applicants for positions as troopers; ordered additional recruitment efforts to compensate for past discrimination in these areas, and directed the submission of quarterly reports to the court outlining such recruitment efforts; and required the Commonwealth to identify and make whole the victims of its past discrimination. The court, however, rejected the United States' request that the remedial order contain numerical goals and timetables for the hiring of women as troopers and blacks as dispatchers.

The United States appealed and the Commonwealth cross-appealed from both district court orders. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded the case to the district court (Pet. App. A).

In rulings not challenged here, the court of appeals affirmed the district court's use of the Title VII impact standard in evaluating the United States' claims under the Crime Control Act (Pet. App. A7); affirmed the district court's holdings that the VSP discriminated against women by use of height and weight requirements (*id.* at A11) and against blacks by use of an unvalidated written test (*id.* at A10); and reversed the district court's dismissal of the United States' claims under Title VII, directing the district court on remand to consider, *inter alia*, petitioners' liability for discrimination between March 24, 1972, the effective date of Title VII, and July 1, 1973, the effective date of the Crime Control Act (*id.* at A7, A14).

The court of appeals also vacated those portions of the district court's order finding no violation of the Crime Control Act. The district court was directed on remand to:

(1) address each civilian job classification to determine which positions, if any, require specialized skills, and, based on this determination, permit further development of the statistical data bearing on alleged discrimination against black applicants for such positions under the standards set forth in *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979) (Pet. App. A13, A14);

(2) reconsider the use of background investigations of applicants for trooper positions in light of the applicable EEOC guidelines (*id.* at A11-A12); and

(3) reconsider the validity of the written examination for trooper positions in light of the applicable EEOC guidelines (*id.* at A11).

The court of appeals expressly declined to discuss the remedies ordered by the district court (*id.* at A14). The court indicated that its views as to the proper relief would depend on the district court's findings on remand, and it reserved judgment on this issue until such findings had been made. Cf. *Hazelwood School District* v. *United States*, 433 U.S. 299, 312-313 (1977).

ARGUMENT

Petitioners seek review of an interlocutory order of the court of appeals remanding the case for further proceedings in which the district court may consider certain claims of the United States in light of Title VII, judicial interpretations of that statute, and applicable EEOC guidelines that the district court did not initially consider. Petitioners do not question the necessity of a remand, for they do not challenge the holding that the district court erred in dismissing the Title VII claims of the United States.

Rather they challenge the propriety of the directions on remand with respect to the claims relating to statistical disparities in the VSP's hiring for civilian positions and to the VSP's use of background investigations and of a written examination for trooper positions.

There is no reason for this Court to depart from its usual practice of declining to review nonfinal orders of courts of appeals. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893). If the proceedings on remand do not result in findings adverse to petitioners, petitioners will have no need to seek appellate review of the issues they are here raising. Review is, in any event, unwarranted because, as we show below, the directions for the treatment of claims on remand are based on a correct understanding of the law and do not conflict with decisions of this Court or of other courts of appeals.

1. Petitioners challenge (Pet. 16-21) the court of appeals' remand of the claim respecting statistical disparities in hiring for civilian positions, contending that the court of appeals found no error in the district court's analysis of that evidence and that therefore it was improper to permit the United States on remand to submit additional statistical data bearing on civilian hiring.

This claim is without merit. The court of appeals implicitly and correctly found that this issue had not been adequately developed or analyzed because the district court and the litigants had not had the benefit of the court of appeals' recent decision in *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178 (4th

Cir. 1979). *Radiator Specialty* sets out an analytical framework, based on this Court's decisions in *Hazelwood School District* v. *United States*, 433 U.S 299 (1977), and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), for determining when the use of specially qualified labor pool statistics, as opposed to general population statistics, is required to establish the existence of racial disparities in hiring, and it also specifies the allocation of the burden of proof in differing circumstances.

Hazelwood holds (433 U.S. at 308 n.13) that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." In *Radiator Specialty*, the Fourth Circuit explained (610 F.2d at 185) that, where the need for specially qualified workers is not "manifest as a matter of law" from the titles of the jobs at issue,

> *the burden should be upon defendant to establish that the positions in fact do require special qualifications not possessed or readily acquired by the general population, at peril of having the general population statistics presumed appropriate* in assessing plaintiff's *prima facie* proof. If the defendant succeeds in this the plaintiff should have an opportunity to adjust his statistical proof to reflect a labor pool base with the special qualifications found required. [Footnote omitted; emphasis added.]

The remand here was needed because, contrary to petitioners' assertion (Pet. 18 n. 2) that the district court's analysis of the United States' statistics "fol-

lows precisely the Court of Appeals' views in *Radiator Specialty*," the district court's allocation of the burden of proof as to some of the civilian jobs was clearly at odds with the *Radiator Specialty* standard. The court recognized (Pet. App. B23, B26) that its determination of which jobs required only skills that are possessed by many persons or are readily acquired was based on a purely speculative assessment of the meaning of the various job titles. It should therefore have held that unless petitioners carried their burden of proving that particular jobs required special skills, the general population data offered by the United States would be accepted as a proper basis for comparison. Instead, the court (*id.* at B23) assigned the United States the burden of proving "that the skills are commonly held and easily learned" in order to establish the relevance of general population statistical data.

Petitioner does not challenge the correctness of the burden of proof standard in *Radiator Specialty*, which, we note, is consistent with statements of this Court in *Dothard* v. *Rawlinson*, 433 U.S. 321, 330-331 (1977). It was therefore entirely proper for the court of appeals to remand so that the district court may make proper threshold findings and permit further development of the record in accordance with those findings.

2. In remanding the United States' claim regarding background investigations of applicants for trooper positions, the court of appeals indicated (Pet. App. A11-A12) that the district court "should consider in the light of [the EEOC] guidelines the charge that the background investigation used by the Commonwealth served as a pretext for eliminating black applicants or whether there was 'some legitimate,

nondiscriminatory reason for the employee's rejection.' *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). *See EEOC* v. *United Virginia Bank/Seaboard National*, [615 F.2d 147 (4th Cir. 1980)]." Petitioners contend (Pet. 23-24) that this remand was improper, because no error was found by the court of appeals in the district court's initial consideration of that claim, and because the EEOC guidelines "have no direct application to cases of alleged intentional discrimination involving disparate treatment."

The first contention is erroneous because the court of appeals implicitly found error in the district court's failure to evaluate the claims relating to allegedly discriminatory background investigations in the light of EEOC guidelines.[4]

The second contention is similarly without merit. It is true that the terms used in the court of appeals' remand on this point ("pretext," "legitimate nondiscriminatory reason") are suggestive of disparate treatment as distinguished from disparate impact (see *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977)), whereas both the EEOC Guidelines and the Uniform Guidelines relate primarily to analyses of disparate impact. But the United States challenged the VSP's use of background investigations on both theories (see Pet. App. B47, B52). While the focus on appeal

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[4] These guidelines include both the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 (1976) (Pet. App. F) (EEOC Guidelines), and the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295 *et seq.* (1978) (Uniform Guidelines), which were adopted by the EEOC, the Civil Service Commission, the Department of Labor and the Department of Justice (see *id.* at 38296).

was on the investigations' disparate impact on black applicants, and this claim is most appropriate for reconsideration under the guidelines on remand, there is no reason why the district court on remand should not consider the evidence pertinent to the disparate treatment theory as well.[5] In any event, the proper interpretation of the remand order is best left to the district court; and however the district court chooses to interpret its obligation on remand, it is of course not foreclosed from again concluding that the VSP's background investigations are valid.

3. The district court found that the VSP's use of a written test for applicants for trooper positions had a "severe adverse impact" on black applicants (Pet. App. B41, B39; see also Table VII, *id.* at B42). The court determined, however, that petitioners had met their burden of establishing the validity of the test by demonstrating that it was a valid predictor of training school performance (*id.* at B47), and that the VSP's use of the test therefore was not an unlawful employment practice (*id.* at B45).

The court of appeals vacated this determination because the district court "declined to apply the EEOC guidelines applicable to the possible discriminatory nature of the written examinations" (Pet. App. A5-A6 (footnote omitted)). The court pointed out that these guidelines constitute the administrative inter-

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[5] For example, the district court on remand might reconsider its disparate treatment findings in light of the EEOC guidelines on disparate treatment (see 29 C.F.R. 1607.11) and it might reconsider its conclusion that the VSP's use of " 'standardless discretion' " in evaluating job applicants' backgrounds is justified regardless of impact in light of Section 6B(1) of the Uniform Guidelines, 43 Fed. Reg. 38299 (1978), which concerns elimination of the adverse impact of informal or unscored selection procedures.

pretation of Title VII by the enforcing agency (*id.* at A6 n.6), and, as such, are entitled to great deference. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 430-431 (1975). Although the district court acknowledged this principle in its opinion (Pet. App. B45), its entire analysis of the Commonwealth's written test under the applicable guidelines consisted of a statement (*ibid.*) that "the validity of a test does not rise or fall solely on the basis of whether the test and the validity study concerning that test meet the Guidelines." A remand for adequate consideration of the guidelines in assessing the United States' claim regarding the VSP's written examination (Pet. App. A11) was therefore entirely appropriate.[6]

There is no merit to petitioners' contention (Pet. 10-16) that the terms of the remand should be reviewed by this Court in order to resolve a dispute between petitioners and the United States over the bearing of *Washington* v. *Davis*, 426 U.S. 229 (1976), on the district court's reconsideration of the United States' claims concerning the validity of the written examination and in order to "eliminate confusion which now exists in the federal courts concerning the proper application of *Washington* v. *Davis* and the principles of training school validation in Title VII actions" (Pet. 10). First, it is possible that findings made by the district court on remand would satisfy *Washington* v. *Davis* standards as construed by either party, thus obviating the need to resolve the dispute between them.

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[6] Thus, for example, the district court on remand might give consideration to Section 14B(3) of the Uniform Guidelines, 43 Fed. Reg. 38301 (1978), which concerns the use of training performance as a hiring criterion.

Second, there is no need to "eliminate confusion in the federal courts" on this question or to resolve any conflict among the circuits. The "confusion" is apparent only in the district court's application of *Washington* v. *Davis*, and no conflict on the question exists among the courts of appeals.

This Court has repeatedly held that a test or other selection device which has a disparate impact on the employment of minorities or women cannot be used unless it has been demonstrated that the test is "related to job performance" or bears a "manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431, 432; accord, *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425; *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 329. In approving the concept of training program validation in *Davis*,[7] this Court reaffirmed its holdings in *Griggs* and *Albemarle Paper* (426 U.S. at 250-251).

In *Davis*, this Court sustained the district court's conclusion that the test was "directly related to the requirements of the police training program" (426 U.S. at 250), reversing the court of appeals' determination that the relationship between the test and training school success did not satisfy "the crucial requirement of a direct relationship between performance on [the test] and performance on the policeman's job" (*id.* at 249-250). The district court in the instant case read *Davis* as holding that "a written test may be validated against training school performance alone even in the absence of evidence

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[7] The bulk of the Court's opinion dealt with a constitutional challenge to the use of the test; no violation of Title VII was alleged by plaintiffs (426 U.S. at 237 n.6). However, the Court applied standards "similar to those obtaining under Title VII" (*id.* at 249) in evaluating the test in question under 5 U.S.C. 3304.

that performance in the training program is related to the actual performance of the work" (Pet. App. B43).

This interpretation of *Davis* is faulty: the Court in *Davis* did not hold that validation against training school performance is sufficient even in the absence of evidence that that *training performance* is related to job performance; rather it held that such validation is sufficient even in the absence of evidence that the *test* is related to job performance. The Court did not reach the first question because plaintiffs did not place the relationship between the training program and the job in issue.[8] Rather, they took the position that the test must be related *directly* to job performance, rather than related *indirectly* through training school performance, regardless of the relationship between the training program and the job. It was this position that the Court rejected in *Davis*.[9]

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[8] This relationship may even have been conceded (see 426 U.S. at 250). In any event the relationship was not disputed before this Court.

[9] Mr. Justice White, who delivered the Court's opinion in *Davis*, confirmed in his dissenting opinion in *National Education Ass'n* v. *South Carolina*, 434 U.S. 1026, 1027 (1978), aff'g mem. *United States* v. *State of South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977) (three-judge court), that *Davis*

> did not hold that a training course, the completion of which is required for employment, need not itself be validated in terms of job relatedness. Nor did it hold that a test that a job applicant must pass and that is designed to indicate his mastery of the materials or skills taught in the training course can be validated without reference to the job.

The three-judge court in *South Carolina* found that the content of the National Teacher Examination (NTE) had

In suggesting that various lower court decisions are "in apparent conflict" (Pet. 13) as to the proper interpretation of *Davis*, petitioners properly cite certain cases (*id.* at 13-14) as supporting the United States' interpretation of *Davis;* for those cases do in fact hold that when a test is validated against a training program, it must also be demonstrated that the training program itself is job-related.[10] But none of the cases cited by petitioners (Pet. 14) as supporting their own interpretation of *Davis* holds that training program validation is sufficient for Title VII purposes without reference to the job-relatedness of the training program.[11] There is thus no conflict among the circuits on this question.

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been adequately validated against the content of teacher training programs in the state, as permitted by *Davis* (445 F. Supp. at 1112, 1113). However, the court also found a substantial relationship between the teacher training programs and the job of teaching (*id.* at 1108, 1116). This Court's summary affirmance of *South Carolina* is thus entirely consistent with our interpretation of *Davis*.

[10] Other cases supporting our construction of *Washington* v. *Davis*, in addition to those cited by petitioners, are *Craig* v. *County of Los Angeles*, 626 F.2d 659, 662-663 (9th Cir. 1980); and *Guardians Ass'n of the New York City Police Dep't, Inc.* v. *Civil Service Comm'n of the City of New York*, 23 Empl. Prac. Dec. ¶ 31,153, at 16,939-16,941 (2d Cir. July 25, 1980).

[11] *Richardson* v. *McFadden*, 540 F.2d 744 (4th Cir. 1976), was not a Title VII case, but rather a Fourteenth Amendment case. *Image of Greater San Antonio, Texas* v. *Brown*, 570 F.2d 517 (5th Cir. 1978), and *United States* v. *City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978), were both Title VII cases, but neither involved an attempt to validate a test against a training program. *United States* v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977), was a Title VII case involving training program validation, but the court did not reach the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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question at issue here because defendants failed to establish that the test adequately correlated with success in the training program. For a discussion of *United States* v. *State of South Carolina, supra,* see note 9, *supra.*

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